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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RUDOLF WOLFF & CO., LTD.,

Petitioner,

—against—

DAVID NEIMAN, d/b/a THE LONDON GROUP (1974),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ELLIOT PASKOFF
405 Lexington Avenue
New York, New York 10174
Tel: (212) 682-4567
Attorney of Record for Petitioner
Rudolf Wolff & Co., Ltd.

and

ALLAN E. LAPIDUS
115 South La Street
Chicago, Illinois 60603
Tel: (312) 781-2200
Attorney for Petitioner
Rudolf Wolff & Co., Ltd.

Of Counsel:
TOWNLEY & UPDIKE

VEDDER, PRICE, KAUFMAN
& KAMMHOLZ

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Questions Presented

1(a). In matters of international commerce, has the Seventh Circuit created a lesser measure of due process available to an alien by permitting Illinois to assert "long arm" jurisdiction over an English Company premised upon the amalgamation and comingling of (1) contacts of the alien found to be *insufficient* for "doing business" with (2) a single forum contact of the alien which, *in and of itself,* does not rise to a constitutionally substantial "transaction of business" in the forum?

(b). Alternatively, in a due process analysis may a Court, having found that an alien's contacts with the forum

fall short of "doing business" there, *tack* on those insufficient "doing business" contacts to a single insufficient contact (two hour meeting in the forum) in order to amalgamate contacts for jurisdictional sufficiency?

2. Whether in matters of international commerce, a State's (Illinois) assertion of in personam jurisdiction over an alien (English Company) by reason of its Long Arm Statute requires a cautious analysis test as suggested by the Second Circuit, weighing as viable components of "due process" the State's particular interest in adjudicating the dispute as against the burdens imposed upon the alien of defending in the American forum?

3. Whether the Seventh Circuit's premise that it is just as inconvenient for the alien English Company to defend in Illinois as would be for the Illinois citizen to prosecute his action in England, *without regard to an analysis of* (a) choice of law, (b) place of contemplated performance, (c) residence of witnesses with personal knowledge, (d) location of relevant documents and (e) whether the alien (English Company)[1] could have reasonably expected that it would be required to defend itself in an American courtroom, reaches the measure of due process available to an alien consistent with the Fourteenth Amendment to the United States Constitution?

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[1] The following persons or entities were parties to the proceedings before the United States Court of Appeals for the Seventh Circuit:

1. David Neiman d/b/a The London Group (1974), a citizen of the State of Illinois;
2. Rudolph Wolff & Co., Ltd., an English Company; organized under the laws of the United Kingdom;
3. James Gourlay, an English resident;
4. Ingleram Investments, Ltd., an English Company.

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Opinions Below

The opinions of the United States District Court for the Northern District of Illinois rendered on March 16, 1978 and, following reconsideration, on April 20, 1979 have not been officially reported and are contained in the annexed appendix [2] at pages A14-A25. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 619 F.2d 1189 (7th Cir. 1980) and is reproduced in the appendix at pages A1-A13.

Jurisdiction

The Seventh Circuit's judgment was entered on April 23, 1980 (App. A26). Petitioner's timely petition for rehearing in banc was denied on May 22, 1980 (App. A27). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision and Statute Involved

The constitutional provision involved is the Due Process Clause articulated in Section I of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend XIV, as applicable to Section 17 of the Illinois Long Arm Statute, III. Rev. Stat., Ch. 110 § 17(1)(a), which recites in pertinent part that:

> (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated thereby submits such person . . . to the jurisdiction of the

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[2] Reference to the Appendix annexed to Wolff's Petition For a Writ of Certiorari herein shall appear as (App. page designation).

courts of this State as to *any cause of action arising from the doing of any such acts*:

(a) The transaction of any business within this State.

(3) *Only causes of action arising from acts enumerated herein* may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section. (Emphasis Supplied) [3]

Statement of the Case

A. Preliminary Statement

This is a diversity action, pending in the United States District Court for the Northern District of Illinois in which plaintiff, David Neiman ("Neiman"), a citizen of Illinois seeks damages from petitioner Rudolf Wolff & Co., Ltd. ("Wolff"), a United Kingdom corporation, located in London, England, for its alleged failure to deliver to plaintiff in London silver bullion purchased on the London Silver Market (App. A1, A33).

Petitioner Wolff does not transact or do business in Illinois; does not maintain an office or telephone listing in Illinois; does not have any employees or agents in Illinois; and does not own any property in Illinois (App. A111-A112).

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[3] The Ill. Rev. Stat., Ch. 110, § 17, has provided a model for a multitude of State Long Arm Statutes. Accordingly, the issues which beg to be resolved before this Court concerning the unprecedented analysis of due process by the Court of Appeals for the Seventh Circuit, extend well beyond the Illinois statute involved herein. *E.g.*, The New York Civil Practice Law & Rules § 302(1)(a) is substantively identical to Ill. Rev. Stat., Ch. 110 § 17, yet the Court of Appeals for the Seond Circuit, in a case bearing remarkable similarity to that at bar, has suggested a cautious analysis approach to transactions having an international context. See Point II, *infra* at page 17.

Jurisdiction was purportedly asserted over petitioner pursuant to the Illinois Long Arm Statute, Ill. Rev. Stat., Ch. 110 § 17(1)(a).

During the summer of 1974, Neiman solicited his own broker, William E. Casselman, for information concerning silver trading on the London Silver Market (App. A4, A22 ¶ 6, A43). Thereafter, on October 14, 1974, James Gourlay,[4] an English resident passing through Chicago on other business, lunched with Neiman and his broker Casselman at a Chicago restaurant for two or three hours (App. A4, A43-A44, A92). Neiman and Gourlay engaged in social dialogue, discussed in general terms the nature of silver trading on the London markets, including a loan agreement of a Swiss financier.[5]

In November of 1974, Neiman placed his first order for London silver bullion by telephoning his broker Casselman, a resident of Stuart, Florida, instructing Casselman to purchase silver for the London Group, a purported limited partnership (App. A45-A46). On November 6, 1974, Casselman from Stuart, Florida wrote to Gourlay in London, England to initiate the first silver bullion transaction (App. A76). Thereafter, Neiman called Casselman in Florida and

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[4] In order to obviate the factual issue of apparent authority, petitioner advised the District Court that, for purposes of its motion to dismiss the Complaint pursuant to Fed.R.Civ. P.12(b)(2), it could be assumed arguendo that Gourlay purported to represent petitioner during the single meeting in Chicago with plaintiff on October 14, 1974. Both the District Court and the Seventh Circuit accepted that premise for purposes of the motion.

[5] The Swiss financier, I. Rochester (Finance), Ltd. was to finance the silver bought by Neiman payable in British sterling with the London silver acting as security for the loan. In this context, before Neiman had any right to demand or expect delivery of the silver in London, the financier's security interest or lien would have to be satisfied in London as would Neiman's obligation to deliver an equivalent amount of silver to Wolff in London.

asked him to purchase 748,000 ounces and then 2,000,139 ounces of silver bullion by contacting Wolff in London, England (App. A49). Subsequently, Neiman contacted Wolff directly by initiating telephone calls from Chicago to London (App. A50).

Neiman's contracts to purchase London silver bullion and sell back an equivalent amount of London silver were to be performed exclusively in England on the London Silver Market without any activity contemplated in Illinois. The silver was located, stored and to be delivered in London, England (App. A77-A78). The silver was to be paid for in British sterling, financed entirely by a Swiss financier, I. Rochester (Finance) Ltd. The debt to the Swiss financier was to be repaid in London out of the British sterling proceeds of Neiman's London silver trading (App. A77, A113, A129).

The gravamen of Neiman's Complaint is Wolff's alleged failure to deliver silver bullion to him in London when in March of 1975 Neiman was in London and demanded delivery (App. A33, A61-A62, A77, A81-A82). During Neiman's meetings in London with his solicitors and those of Wolff, petitioner came to doubt Neiman's financial responsibility [6] and demanded full cover for Neiman's contracts to deliver London silver in the future, a position Wolff had the right to take pursuant to custom and usage in London silver trading and the Rules of the London Silver Market (App. A77-A78, A109, A115). Following Neiman's failure to cover the loan by the Swiss financier (App. A168-A170, A115) or to provide the cover for his future obligations,

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[6] It should be noted that Neiman through the date of this petition has not paid even one American dollar to Wolff or anyone else while purporting to purchase and sell 16,601,000 ounces of London silver bullion. The record amply demonstrates the absence of Neimans's financial responsibility (App. A40-A42).

Wolff refused to deliver the silver to Neiman in London until the encumbrances against it were satisfied; the litigation at bar ensued.

B. The Decisions of the District Court

The District Court, in a memorandum decision of March 16, 1978, reviewed Neiman's own deposition testimony and held that Wolff's luncheon meeting with Neiman in Chicago did not qualitatively possess "minimum contacts" so that it could be said that Wolff, by its voluntary acts, invoked the benefits and protections of Illinois law. Recognizing that the gravamen of plaintiff's complaint is that Wolff failed to deliver silver bullion to plaintiff in London, the District Court was not unmindful that "minimum contacts" must be viewed as to "what is fair and reasonable in the circumstances of a particular case" Wolff's motion to dismiss for lack of jurisdiction over its person was granted (App. A17).

During the year following the order of dismissal as against Wolff, Neiman took the deposition of five non-party witnesses, William Casselman, Ronald Richter, Moshe Shaltiel, Joseph Klein, Edward Hansen and Marshall Persky. Upon those depositions, Neiman moved for reconsideration and argued that Wolff was "doing business" in Illinois. The District Court, although denying the motion for reconsdieration, did so following its careful analysis of Neiman's new deposition evidence. The District Court reviewed the depositions of the foregoing witnesses and correctly determined that all but one Illinois resident had solicited Wolff to engage in London commodities transactions for their own investment motivation (App. A24, A86, A99-A100, A102, A105-A106, A124). Neiman, on his own deposition, admitted that he was desirous of trading in London silver and initiated the meeting with Gourlay (App. A4).

The District Court was also aware of the requirement that where jurisdiction is asserted over a non-resident upon its transaction of business under a Long Arm Statute, the cause of action must arise out of the transaction of business. Accordingly, the District Court did not amalgamate the volume of London transactions which the few other Illinois residents had done with Wolff in London as a consequence of their own solicitation of Wolff in order to trade in London commodities as part of their personal investment desires (App. A99-A100, A102, A105-A106, A124).

C. Opinion of the Court of Appeals

The Court of Appeals affirmed the dismissal of Neiman's common law tort claim, but reversed the judgment dismissing the breach of contract claims against petitioner Wolff and defendant Gourlay.

Wolff's limited contacts with Illinois over the years were reviewed by the Court of Appeals for purposes of determining whether jurisdiction could be asserted on either "doing business" presence or as "a transaction of business." Gourlay in late 1973 or early 1974 had visited Chicago and met with Casselman, Persky and Klein and discussed a tax shelter program. Persky and Klein upon deposition stated they were not solicited by Gourlay. To the contrary, they solicited Wolff since it was their own desire to trade in London metals (App. A86, A99, A102).[7]

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[7] Notwithstanding the unambiguous testimony of Messrs. Persky and Klein that Gourlay had not solicited them to trade in London, the Court of Appeals at footnote 1 of its opinion resolved the "factual disputes" in favor of Neiman. The remarkable error of the resolution of the facts in Neiman's favor is that no dispute exists since all persons who were prseent at that 1973 meeting agree that there was no solicitation.

Neiman never even heard or knew of Persky or Klein until subsequent to this litigation. Accordingly, the Court of Appeals erroneously created a factual issue of solicitation of Persky and Klein by Gourlay in 1973 and resolved it in Neiman's favor when no such dispute existed (App. A3n.1).

The opinion then noted, and presumably relied on, that Casselman during 1974 had placed twenty four London silver transactions with Wolff in London for his customers. Unfortunately, the Court of Appeals missed that part of Casselman's testimony where he explained that only Neiman and one other person were Illinois residents. His other clients had no relationship to Illinois and, in fact, traded in London commodities after Casselman had moved to Florida (App. A95, 97).

The opinion described how Gourlay on two occasions had met with Ronald Richter, an Illinois resident, for less than one hour and concluded "cash-and-carry transactions involving forty-nine million dollars worth of silver and option contracts for silver worth hundreds of millions of dollars" [8] (App. A6). Again, the Court of Appeals failed to note and perhaps consider in its measure of due process that Richter had initiated the calls to Gourlay because he wished to trade in London silver; and that during Richter's calls to London, virtually all of the terms were negotiated on the telephone (App. A106). In essence, Gourlay's two visits with Richter in Illinois, each lasting less than one hour, were an insubstantial part of Richter's transactions of London business with Wolff.

Lastly, the Court of Appeals detailed the October 14, 1974 meeting between Neiman, Casselman and Gourlay in Chicago, Illinois. That two or three hour luncheon, arranged while Gourlay was passing through Illinois on other business, was the only contact attributable to Wolff on which

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[8] Richter's trading in London options are unquestionably unrelated to Neiman's London silver cash and carry transactions. It cannot be denied that Neiman's cause of action does not arise from Richter's London option transactions. Notwithstanding, the Court of Appeals seems to have amalgamated Richter's option trading with Neiman's London silver trading to support "a transaction of business" presence in Illinois.

Neiman's action arises. Although the Court's opinion correctly describes that Gourlay, Neiman and Casselman differ in their respective accounts of that luncheon, it is significant that Casselman and Gourlay independently agree that Gourlay did not solicit Neiman's business but only responded to his questions. Neiman's own version does not state that he was solicited and concedes that not even a single proposal for specific silver purchases was discussed (App. A5, A45, A92, A119).[9]

The opinion correctly concludes that Wolff's isolated, sporadic transactions with residents of Illinois and mere occasional solicitation does not reach "doing business" presence required for the assertion of in personam jurisdiction over the alien Wolff (App. A6-A7).

However, it is at this analytical juncture, that the Court of Appeals departs from the teachings of this Court and, ignoring the clear testimony by the non-party witnesses of their solicitation of Wolff (App. A99-A100, A102, A105-A106, A124), amalgamates their unrelated London commodities transactions with Wolff in London, which were *unknown to Neiman* and *from which Neiman's claims do not arise,* with the two hour luncheon between Gourlay and Neiman. The Court of Appeals' erroneous analysis and unprecedented theory of amalgamating contacts insufficient for "doing business" with a contact insufficient for jurisdictional presence as a "transaction of business" is revealed in its opinion by the following language:

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[9] The preliminary nature of the October 14, 1974 luncheon is evidenced by the fact that even after Casselman, a resident of Stuart, Florida (App. 76), had instructed Wolff to trade in London silver (App. A45), Neiman's counsel two months later in December of 1974, wrote to Wolff in London indicating that the transactions were merely contingent and not binding on Neiman unless he formed a limited partnership capitalized with at least $1,000,000 (App. A54-A57). The limited partnership was never formed, a fact never revealed to Wolff (App. A53, A58-A59).

> . . . *when the luncheon meeting is considered with Gourlay's solicitation of Casselman and other ACLI brokers in late 1973 or early 1974,* Gourlay's conduct in Illinois was sufficient to permit the district court to exercise personal jurisdiction over Gourlay and his principal, Wolff (App. A9). (Emphasis Supplied)

There is little doubt that the two hour luncheon held on October 14, 1974 between Neiman and Gourlay in Chicago, *in and of itself* does not satisfy "minimum contacts" under the Illinois Long Arm Statute. *International Shoe Co.* v. *Washington, supra; Tommills Brokerage Company* v. *Loeb Rhodes & Company,* 411 F.2d 764 (7th Cir. 1969); *Chicago Silver Exchange* v. *United Refinery,* 334 F. Supp. 1332, 1335 (N.D. Ill. 1975).

Accordingly, the Court of Appeals has, by this decision, created a lesser standard of due process which affords the amalgamated whole (jurisdictional sufficiency under the Fourteenth Amendment) a value which is greater than the sum of its parts (contacts which are insufficient for "doing business" or a "transaction of business"), to the constitutional detriment of an alien.

Because the Court of Appeals has gone well beyond this Court's due process guidelines so as to permit the transatlantic assertion of in personam jurisdiction over Wolff, it has become impossible for any alien to predict the consequences of its conduct and comprehend when and where its conduct will subject it to suit in the United States.

As previously noted, the Court of Appeals reversed the judgment of dismissal over Wolff and Gourlay and remanded the action to the District Court.

Reasons for Granting the Writ

I.

Supreme Court Guidance Is Urgently Needed In Present Times Of International Commerce So That Alien Persons Engaging In Commercial Transactions With American Citizens Abroad Can Predict, With Some Reasonable Assurance, The Consequences Of Their Acts.

This case involves a jurisdictional issue transcending national boundaries, affecting international commerce, and the ability of an alien to understand and predict the consequences of its acts with an American citizen consistent with due process afforded under the Fourteenth Amendment to the United States Constitution, U.S. Const. amend XIV. This Court's articulated guidance on balancing the constitutional guarantee of due process as against a state's assertion of in personam jurisdiction over a non-resident, has measured due process within the sovereign and territorial context of interstate federalism between citizens of different states. *Milliken* v. *Meyer,* 311 U.S. 457 (1940); *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957); *Hanson* v. *Denckla,* 357 U.S. 235 (1958); *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 62 L.Ed.2d 490 (1980).

This Court has never directly set forth the parameters of due process available to an alien, not "doing business" in the forum, concerning a dispute between an American

citizen and an alien who performs commercially for the American citizen outside of the United States.[10]

Without this Court's guidance on this issue of paramount import to all aliens like Wolff, engaged in business relations with Americans, the Seventh Circuit's opinion, premised upon the unprecedented comingling or amalgamation of due process concepts of "doing business" with those arising from "a transaction of business", results in a new but constitutionally impaired standard of due process. This new standard confuses or lessens the degree of predictability which allows aliens to structure their conduct with some reasonable assurance as to where that conduct will and will not render them subject to suit.

The Courts below have accepted as established precedent that the Due Process Clause, as the bulwark against state jurisdictional expansion, resulting in inconvenient or distant litigation, has been substantially relaxed. This trend favoring State expansion was first articulated by this Court in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, (1957) where it observed:

> Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the

[10] Approximately twenty-eight (28) years ago this Court in *Perkins* v. *Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952), addressed an issue of jurisdictional due process asserted by a State over a Philippine company. However, that decision did not reach the issues raised by this petition since the alien defendant was found to have been continuously and systematically "doing business" in the State of Ohio. In the instant petition, the Seventh Circuit specifically held that petitioner was *not* continuously and systematically present in Illinois to be "doing business" there, yet amalgamated or tacked those insufficient contacts on to Neimen's independent and unrelated two hour meeting which was, in and of itself, insufficient for jurisdictional presence.

> amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-223.

This Court's decision in *Hanson* v. *Denckla*, 357 U.S. 235 (1958) contains language which buttresses this discernible trend of State expansion of its right to adjudicate disputes involving its citizens within its own courts:

> As technological progress has increased the flow of commerce between the States, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. . . .

Id. at 250.

However, the foregoing observations of this Court have always been made in controversies involving interstate federalism between American citizens of different States and not in any case requiring an alien defendant to be hauled into an American forum, across an ocean, to defend itself. Assuming *arguendo* than an alien is not present in the United States by reason of "doing business," there has been no direct voice by the Supreme Court on how to balance the components of due process where the alien defendant is required to cross an ocean to defend itself in an American forum. The Seventh Circuit, in weighing the components of due process, has ignored the critical distinction between litigation involving citizens of different states and litigation between an American citizen and an alien domiciled to a different continent.

Accordingly, to permit the Seventh Circuit's decision to stand in the face of this Court's concern for the burdens

imposed upon a non-resident domestic corporation required to litigate in a distant or inconvenient forum, *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 62 L.Ed 2d 490 (1980), shall result in manifest injustice to aliens who, like petitioner Wolff, are performing commercially in a foreign country for an American citizen. It becomes impossible for that alien to predict or understand, with reasonable assurance, when and where its conduct will result in causing it to litigate in an American forum by reason of a lesser measure of due process available to it under the United States Constitution.

II.

In Matters of International Commerce The Seventh Circuit's Due Process Analysis Is In Conflict With The Second Circuit's Cautious Analysis Test.

A reading of the Seventh Circuit's opinion below leads one to conclude that American citizens who trade in foreign --non-United States—securities or commodities markets may successfully assert, by virtue of a State Long Arm Statute, in personam jurisdiction over the alien broker should a dispute involving the foreign trade arise.

The Seventh Circuit's decision has erroneously permitted the amalgamation and tacking of insufficient jurisdictional contacts so as to create a purported compound of constitutional sufficiency. This Court has never suggested, as the Seventh Circuit has done, that the distinct concepts of jurisdictional presence of "doing business" and a "transaction of business" may be comingled or amalgamated.

Moreover, the decision has repealed by implication the statutory requirement that the cause of action arise from the alien's acts in the forum, Ill. Rev. Stat., Ch. 110 § 17,

when the Court included in its "transaction of business" analysis activities wholly unrelated to and independent of Neiman's trading in London silver unique to his own investment strategy. Subsection (3) of the Illinois statute, limits jurisdictionally relevant contacts to those out of which plaintiff's claims arise, *Chicago Silver Exchange* v. *United Refinery,* 394 F. Supp. 1332 (N.D. Ill., 1975) and is essential to the constitutional assertion of jurisdiction over non-resident defendants who *do not* engage in a continuous and systematic course in business in Illinois, i.e., who are not "doing business" in Illinois. The "arising from" language common to State Long Arm Statutes, is to insure that there is a close relationship between a non-resident's jurisdictional activities and the cause of action against which he must defend. *Xedit Corp.* v. *Harvel Industries Fidelipac,* 456 F. Supp. 725 (S.D.N.Y. 1978).

By amalgamating the contracts of petitioner with Illinois as they involved unrelated persons and independent transactions of one year earlier (App. A9), together with the single contact of the two hour luncheon involving Neiman's claim, the Court of Appeals has rejected the heretofore unquestionable rule, embraced by other Circuits, that a non-resident defendant's isolated and sporadic transactions in the forum are jurisdictionally insufficient unless they are the very transactions out of which plaintiff's claims arise. *Charia* v. *Cigarette Racing Team, Inc.,* 583 F.2d 184, 189 (5th Cir. 1978); *Long* v. *Victor Products Corporation,* 297 F.2d 577 (8th Cir. 1961); *Tommills Brokerage Co.* v. *Loeb, Rhoedes & Co.,* 411 F.2d 764 (7th Cir. 1969).

The suggested premise of the Seventh Circuit's decision is in direct conflict with the analysis provided by Judge Henry Friendly writing for the Second Circuit in *Bersch* v. *Drexel Firestone, Inc.,* 519 F.2d 974 (2d Cir.) *cert. denied,* 423 U.S. 1018 (1975).

In *Bersch,* the issue before the Second Circuit was whether Americans trading in Canadian securities on the Canadian Securities Market may constitutionally assert in personam jurisdiction over the Canadian broker when litigating a dispute concerning the foreign securities in an American forum. The operative facts revealed that the Canadian broker visited New York investment houses four or five times "in an apparent attempt to drum up trade" and had two meetings in New York at which, among other things, the subject of the Canadian securities underwriting [IOS offering] was discussed. *Id.* at 99 fn. 56).

The *Bersch* decision bears remarkable similarity to that involving the petitioner and Neiman. The Canadian broker attended two breakfast meetings in New York where one of its partners met with the IOS chief attorney and one of the principal architects of the IOS offering. The concept of the securities offering was discussed, as was the capital structure of the corporation dividend policy, terms, and timing of the issue with no detailed recommendations and no final decisions being made. In *rejecting* in personam jurisdiction premised upon these meetings, Judge Friendly found the injuries to American citizens being too tenuous to permit the wrongs as "arising from" the two breakfast meetings. *Supra* at 999. On the issue whether the Canadian broker was otherwise present in New York, the Court took a cautious analysis view of international transactions and opined:

> [The Canadian broker's] current business so far as the United States is concerned, consists of buying and selling for Americans securities traded on Canadien markets and arranging with American brokers for its Canadian customers to buy or sell securities traded in American markets. This is not doing business within the United States; if it were, every securi-

> ties dealer of any significant size anywhere in the world would be "doing buisn ss" here. *Supra* at 998.

In any comparison between the Seventh Circuit decision and that of the Second Circuit, the unfortunate result is that the alien is thoroughly confused and unable to understand the consequences of his acts with an American citizen and when performing commercially on foreign soil will subject him to suit in an American forum despite the wholly foreign nature of the transaction.

Petitioner believes that in matters of international commerce, the cautious analysis view of the Second Circuit, articulated in *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1341 (2d Cir. 1972) and relied on in *Bersch, supra,* should prevail over the unprecedented Seventh Circuit theory of amalgamating insuffiicent jurisdictional contacts. The importance of this Court's direct voice and resolution of the issues raised is evidenced by the continued expansion of international commerce and manifest conflict between Circuits resulting in a state of confusion for aliens who perform commercially in their own nations for American citizens. If the Seventh Circuit's decision is permitted to stand, without benefit of this Court's review, Neiman, an American citizen having paid neither a single dollar nor a single British pound to anyone and having duped an English company into trading 16,601,000 ounces of London silver for Neiman's non-existent partnership (App. A53-A54, A79), shall have the power to compel that English company into defending itself in an American court involving exclusively London transactions and substantive issues turning on English law. This result, in the face of "traditional notions of fair play and substantial justice", brings to mind Judge Ely's caricature of "Blind Justice with arms of rubber" stretching half way around the world. *Duple*

Motor Bodies, Ltd. v. *Hollingsworth,* 417 F.2d 231, 236 (9th Cir. 1969) (dissenting opinion).

III.

In Matters of International Commerce The Burdens Of Defending In A Distant Or Inconvenient Forum Must Be Carefully Weighed As A Component Of Due Process.

Although it appears that the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, protects "the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 62 L.Ed.2d 490, 498 (1980), the Seventh Circuit has voided that component of due process, at least when weighing the burdens of defense imposed upon an alien.

In addressing the issue of the burden of defense imposed upon Wolff, the Seventh Circuit has opined that the interest of the forum state and issue of convenience are "secondary factors" (App. A11 n.8). Its conclusion that Illinois has an interest in adjudicating this dispute because Neiman is a citizen of Illinois is overly simplistic. Aside from Neiman's citizenship, this is not a case involving dangerous instruments where Illinois might have some greater interest in protecting its citizens. Restatement (Second of Conflict Laws § 37, Comment a (1971). Rather, this is a case involving peculiarly London transactions, governed by the Rules of the London Silver Market and where all witnesses, other than plaintiff, are likely to be English residents.

With respect to the factor of convenience, the Seventh Circuit makes no attempt to discuss (1) choice of law; (2) nature of the commercial transactions; (3) place of contemplated performance; (4) residence of witnesses; (5)

location of relevant documents; and (6) whether Wolff could have reasonably expected that it would be required to defend itself in an American courtroom. Rather, the Seventh Circuit shifts the burden of inconvenience to Neiman and states "[a]lthough it may be inconvenient for defendants, an English corporation and citizen, to defend in Illinois, it would also be inconvenient for plaintiff to sue overseas." (App. A11 n.8). This analysis, as it is designed to do, entirely negates the inconvenience component of due process when a defendant happens to be an alien. It is respectfully submitted that this Court did not intend to create components of due process that can be so easily negated in the case of an alien as to be substantively nonexistent.

The record, upon Neiman's own deposition testimony reveals that Neiman initiated the London transactions involved at bar; the London transactions were governed by the Rules of The London Silver Market and custom and usage of London silver trading (App. A109, A115); the transactions contemplated complete performance in London, including storage of the metal, payment and delivery to occur there; the transactions were financed by a Swiss financier and payable in British sterling in London (App. A77, A113, A120); Neiman's demand for delivery and representations of his ability to perform occurred in London (App. A33, A61-62, A77, A81-A82); all witnesses for both Neiman and Wolff are English residents (App. A65-A68, A73, A83);[11] all relevant documents are located in London; and

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[11] Neiman must prove his alleged performance on his future obligations to deliver an equivalent quantity of silver to Wolff in London by calling as a witness Mr. Edgar of Sharps, Pixley London, England, who Neiman testified agreed to cover his future obligations to Wolff; Mr. Edgar's testimony shall also be relied on by Wolff.

Additionally, since Neiman denies that his London solicitors had authority to represent to Wolff that Neiman would cover his future obligation to Wolff (App. A67, A77), those London solicitors, Coward Chance, are necessary witnesses for Wolff.

finally, Neiman should have contemplated that any dispute arising from the silver transactions would be resolved in London. Wolff, of course, believed the same. Under no reasonable construction of "fair play and substantial justice" could Wolff have contemplated or foreseen that it would have to stand trial in an Illinois courtroom defending a lawsuit concerning Neiman's London silver transactions for which he has not paid even a single dollar or British pound. See Restatement (Second) of Conflict of Laws § 24, Comment b (1971).[12]

Conclusion

If the Seventh Circuit's decision is permitted to stand, it effectively negates due process as available to aliens who commercially perform in their own country for American citizens. Moreover, as against the States' ever expanding effort to assert jurisdiction by virtue of Long Arm Statutes, it would create a dual standard of due process, one embraced by the Second Circuit consistent with this Court's teachings and one created by the Seventh Circuit amalgamating insufficient jurisdictional contacts into an artificial compound of jurisdictional sufficiency. Justice, fairness and the furtherance of international commerce commend that this Court offer its direct voice on this issue of manifest import to all aliens.[13]

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[12] The Restatement, *supra* at § 24, comment b suggests use of jurisdictional factors which measure what is "fair and just" and in "the best interest of international and interstate systems."

[13] Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv.L.Rev. 1121, 1127 (1966) appropriately points out that "in establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate and convenient. To a degree it must take into account the views of other communities concerned. Conduct that is overly self-regarding with respect to the taking and exercising jurisdiction can disturb the international order and produce political, legal and economic reprisals."

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLIOT PASKOFF
405 Lexington Avenue
New York, New York 10174
Tel: (212) 682-4567
Attorney of Record for Petitioner
Rudolf Wolff & Co., Ltd.

and

ALLAN E. LAPIDUS
115 South La Street
Chicago, Illinois 60603
Attorney for Petitioner
Rudolf Wolff & Co., Ltd.

Of Counsel:

TOWNLEY & UPDIKE
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ

Certificate of Service

I Hereby Certify That on this 19th day of August, 1980, three copies of the Petition For A Writ of Certiorari were served, by first-class mail, postage pre-paid on:

Edward T. Joyce, Esq.
Attorney of Record for Respondent
David Neiman
77 West Washington Street
Chicago, Illinois 60602

William J. Harte, Esq.
Attorney for Respondent
David Neiman
111 West Washington Street
Suite 2025
Chicago, Illinois 60602

Theodore Low, Esq.
Attorney for Defendant
James Gourlay
11 South La Salle Street
Chicago, Illinois 60603

I Further Certify pursuant to Rule 28.3 of this Court that all parties required to be served have been served.

.....
Elliot Paskoff
Attorney of Recond for Petitioner
Rudolf Wolff & Co., Ltd.
Townley & Updike
405 Lexington Avenue
New York, New York 10174
Tel: (212) 682-4567

APPENDIX

APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 79-1622 and 79-1802

DAVID NEIMAN d/b/a LONDON GROUP (1974),

Plaintiff-Appellant,

v.

RUDOLF WOLFF & CO., LTD., JAMES GOURLAY and INGLERAM INVESTMENTS, LTD.,

Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-C-2531—**Thomas R. McMillen**, *Judge.*

ARGUED FEBRUARY 15, 1980—DECIDED APRIL 23, 1980

Before CUMMINGS, SPRECHER, and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* This is a diversity action asserting claims arising out of silver transactions on the London Silver Market. Jurisdiction over the person of the defendants is asserted under the Illinois long-arm statute, Ill. Rev. Stat., ch. 110, § 17, applicable by virtue of Rule 4(e), Fed. R. Civ. P. Based on depositions, documents, and affidavits, the court dismissed the action for lack of jurisdiction, holding that the defendants' contacts with Illinois were insufficient to subject them to that state's jurisdiction. We reverse that decision with respect to two defendants.

Plaintiff David Neiman is a citizen of Illinois. Defendant Rudolf Wolff and Company Ltd., is a United Kingdom corporation with its office in London. Defendant James Gourlay is a British citizen.

Wolff is in the business of trading in metals, including silver. It acts as broker and principal in transactions on the London Silver Market. It has had no connection with Illinois other than the events described below.

Gourlay, who lives and works in London, was formerly employed by Wolff and later was engaged in the business of advising and counseling with respect to metal trading. For purposes of the present appeal, the parties stipulate that Gourlay was acting as Wolff's agent with respect to the events involved in this case.

Plaintiff withdrew its claim against a third defendant, Ingleram Investments, Ltd., during oral argument in this court.

Because the district court has decided the defendants' motion solely on the basis of written materials, Neiman need only show a prima facie case for personal jurisdiction. *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971); *Data Disc, Inc. v. Systems Technology Associates Inc.*, 557 F.2d 1280, 1285 & nn.1 & 2 (9th Cir. 1977). In addition, Neiman is entitled not only to the acceptance of all undenied factual assertions in his submissions, but also to the resolution in his favor of all disputes about relevant facts. *United States Railway Equipment Co. v. Port Huron & Detroit Railroad*, 495 F.2d 1127, 1128 (7th Cir. 1974); *O'Hare International Bank v. Hampton*, *supra*, 437 F.2d at 1176.

Some time in late 1973 or early 1974 Gourlay visited Chicago and called on William E. Casselman, a commodities broker, whom Gourlay had known in a prior business relationship. Casselman was with a Chicago firm called ACLI. After Casselman had asked Gourlay, whom he had not seen in a few years, what he was doing and Gourlay had responded that he was "working on a tax shelter program," Gourlay went on to say, according to Casselman's deposition testimony, "[W]e have devised

a method of getting an interest deduction that looks . . . like it's a feasible situation." Gourlay explained the tax shelter program to Casselman and two or three of the latter's business associates in the ACLI firm.[1] The device around which the program was built was known as a "cash-and-carry" transaction and was later explained by Gourlay in an affidavit filed in this case as follows:

> A "cash-and-carry" transaction is a straddle in which one purchases a quantity of silver for immediate delivery; the purchase price is wholly financed by a third party financier in a non-recourse loan secured by the purchased silver and repaid with the proceeds of the sale of that silver on the due date of the loan; and, the buyer at the time of the purchase immediately sells the silver for delivery on the loan's due date.

Casselman understood Gourlay to say that he contemplated that the cash-and-carry transactions he had in mind would be carried out through Wolff. According to Casselman, Gourlay also said that he and an associate had arranged financing for the transactions with I. Rochester, a Swiss banking firm. Thereafter, Casselman stated, he had several telephone conversations with Gourlay about the tax shelter program in which Gourlay supplied additional information.

During 1974 Casselman placed orders for various customers that resulted in approximately twenty-five

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[1] Casselman testified that Gourlay also explained the tax shelter to Marshall Persky and probably to Joseph Klein at ACLI during that visit. Both Persky and Klein denied discussing any business with Gourlay in Chicago at that time. Persky did testify, however, that he learned of cash-and-carry silver from Casselman about the time of Gourlay's visit and that he placed orders with Gourlay, presumably for customers, in late 1973, 1974, and 1975. Klein, who first met Gourlay in London in 1969, also testified to having conducted six cash-and-carry transactions at some point during this time period, but did not say that he learned of the shelter through either Gourlay or Casselman. As we have said, factual disputes are resolved in favor of Neiman.

cash-and-carry transactions. All were handled through Gourlay with Wolff, some were financed by I Rochester, and some were actively solicited by Casselman. Marshall Persky, another ACLI broker to whom, according to Casselman, Gourlay explained the cash-and-carry transactions during his visit to Chicago, testified by way of deposition that he entered into cash-and-carry transactions through Gourlay in late 1973, 1974, and 1975.[2]

In the summer of 1974 David Neiman approached Casselman to discuss the possibility of using silver trading as a tax shelter. Casselman told Neiman about the device Gourlay had worked out and answered many questions asked by Neiman about that device. Casselman also said that Gourlay was planning to be in Chicago in the fall of 1974 and could meet with Neiman. Neiman asked Casselman to arrange a meeting. Some time thereafter, and before the luncheon meeting that was ultimately held, Casselman gave Neiman a copy of the form of loan agreement used for the I. Rochester financing.

The luncheon meeting between Neiman, Gourlay, and Casselman was arranged for October 14, 1974, during a visit Gourlay was making to Chicago for other reasons. The accounts of the meeting presented in the depositions of Neiman and Casselman and the affidavit of Gourlay vary significantly. Neiman testified that in addition to asking many questions about the tax shelter device, silver trading, the Wolff firm, and Gourlay's relationship to Wolff, Neiman discussed with Gourlay the I. Rochester loan agreement form and asked for two specific changes on the form, which Gourlay said could be made.[3] Neiman also testified that he and Gourlay discussed Wolff's commission rate, Neiman asking that it be reduced and Gourlay stating that it could not be

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[2] As stated in note 1, Persky denied discussing any business with Gourlay in Chicago at that time, but testified that he learned of cash-and-carry silver from Casselman about the time of Gourlay's visit.

[3] Neiman also testified that Casselman's stated reason for proposing to Neiman that he meet with Gourlay was to work out differences in the I. Rochester loan agreement form.

reduced. Neiman concedes that no specific amounts of silver purchases were discussed but asserts that he did tell Gourlay that he would place substantial orders if the transactions could be handled as Gourlay had outlined.

Neiman also testified that after lunch, while he and Gourlay were sharing a taxicab, he told Gourlay that if the changes he wanted in the I. Rochester form of loan agreement were made, Neiman "thought we had a very large thing going."

Gourlay's version of the meeting, as stated in his affidavit, was that he explained the cash-and-carry transaction and "pointed out to Neiman that its attractiveness would depend on his individual financial and tax circumstances, and suggested that the situation could only be evaluated by him and his tax and financial advisers." Gourlay states that no proposals were made by any of the parties.

The version Casselman gave in his deposition was that Neiman asked many questions about the tax shelter device and silver trading. He could not recall any discussion about the loan agreement form or the nature of the Wolff firm and its business. Casselman testified that Gourlay did not solicit business from Neiman but merely answered his questions.

In November 1974 Neiman, in the name of "the London Group," placed four orders for cash-and-carry transactions with Gourlay. The orders were placed through Casselman, who by then had moved to Florida. During the next few months Neiman placed three more orders directly with Gourlay on behalf of the London Group. As a result of these orders seven cash-and-carry transactions were concluded on the London Silver Market for the purchase and sale for future delivery of a total of 16,601,000 ounces of silver. All the transactions were handled by Wolff and financed by I. Rochester in the manner Gourlay had described in his conversations with Casselman and his associates and in his conversation of October 14, 1974 with Casselman and Neiman. The purchases were confirmed by written confirmation notices sent by Wolff to Neiman. These are the transactions out of which the claims in suit arise.

Neiman has also presented evidence that Wolff, through Gourlay, had other contacts with Illinois during this period. Specifically, Ronald Richter testified by way of deposition about two meetings with Gourlay in Chicago, in October, 1974 and October, 1975. At these two meetings, each of which lasted less than an hour, Richter and Gourlay concluded cash-and-carry transactions involving $49 million worth of silver and option contracts for silver worth hundreds of millions of dollars. The terms of the cash-and-carry transactions had been worked out prior to the meeting, but Gourlay wanted to meet Richter and persons who knew Richter before concluding the transactions. In addition, smaller details were settled and the terms were perhaps clarified. Richter had only casually mentioned option contracts over the telephone prior to the meetings. Gourlay then successfully solicited Richter's business during their meetings.

Neiman's amended complaint alleges claims for breach of contract against Wolff and Gourlay and an alternative claim for breach of warranty of authority against Gourlay. Also alleged is a claim against both defendants for what is designated as "common law fraud" but is later described as a conspiracy "to deprive Neiman of the benefits of his contracts with Wolff." We consider first the issue of jurisdiction over the claims sounding in contract.

I.

Plaintiff's argument that, by reason of the events described above, Gourlay and Wolff were doing business in Illinois in 1974 in the traditional sense, requires little discussion. Mere occasional solicitation does not subject a defendant to the state's jurisdiction generally, *i.e.*, as to claims not arising from the solicitation. *Lindley v. St. Louis-San Francisco Ry.*, 407 F.2d 639, 642-43 (7th Cir. 1968); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968); *Long v. Victor Products Corp.*, 297 F.2d 577 (8th Cir. 1961). Nor do isolated, sporadic transactions with residents of the forum state. *See Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 189 (5th Cir. 1978). Nor does the

acceptance elsewhere of orders resulting from the solicitation, which necessarily includes mailing confirmations into the state. *See Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998-99 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). Accordingly, the assertion of personal jurisdiction over Gourlay and Wolff must rest on the Illinois long-arm statute, § 17 of the Illinois Civil Practice Act.

II.

We hold that personal jurisdiction exists with respect to the contract claims under § 17(1)(a), which confers jurisdiction over a cause of action arising from "[t]he transaction of any business within this State." First, the Illinois courts have applied the quoted provision to sustain jurisdiction in circumstances analogous to those at bar. In *Kropp Forge Co. v. Jawitz*, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962), defendant, after extensive negotiation by telephone, traveled to plaintiff's premises in Illinois for a quick inspection of the machinery to be sold. This was held sufficient for jurisdiction as "activity in furtherance of" the contract by the defendant in Illinois.[4] *See also United Air Lines, Inc. v. Conductron Corp.*, 69 Ill. App. 3d 847, 26 Ill. Dec. 344, 387 N.E.2d 1272 (1979). *Compare Koplin v. Thomas, Haab & Botts*, 73 Ill. App. 2d 242, 219 N.E.2d 646 (1966) *with Koplin v. Saul Lerner Co.*, 52 Ill. App. 2d 97, 201 N.E.2d 763 (1964). In fact, since § 17(1)(a) reaches as far as federal due process allows, its scope "is measured by federal standards." *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1250 (7th Cir. 1972), *cert. denied*, 405 U.S. 1041 (1972); *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 598-99 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1087 (1980).

In our opinion, the foregoing activities of Gourlay in Illinois satisfy the due process requirement, as stated in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), of

[4] This alternative holding is to be accorded precedential weight. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

"some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *See also World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559, 567 (1980); *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., supra.* The defendants here, unlike the defendant in *Lakeside*, 597 F.2d at 601, themselves conducted activities within the forum state. Whether these activities make exercise of personal jurisdiction reasonable is, therefore, the focus of our inquiry.

If we credit Neiman's version of the October 14, 1974 luncheon meeting with Casselman and Gourlay, as we must for present purposes, that meeting was a significant contact by the defendants with Illinois. Although this conversation, even by Neiman's own testimony, did not constitute the entire dealings between the parties or the entry into a completed contract, neither of these results is necessary to satisfy the requirements of due process. The conversation did constitute the bulk of the parties' negotiations about terms of the arrangement. A defendant's participation in the state in substantial preliminary negotiations leading to the contract in issue has been held a sufficient basis for long-arm jurisdiction, *National Gas Appliance Corp. v. AB Electrolux*, 270 F.2d 472 (7th Cir. 1959), *cert. denied*, 361 U.S. 959 (1960), even under New York's long-arm statute, which does not extend as far as due process allows, *Liquid Carriers Corp. v. American Marine Corp.*, 375 F.2d 951 (2d Cir. 1967). Although this luncheon meeting was not as prolonged a negotiation as those in *National Gas Appliance and Liquid Carriers*, a defendant's participation in one or two brief meetings in the forum state has been held sufficient for the exercise of personal jurisdiction when significant negotiation of important terms of the transaction occurs.[5] Since, according to Neiman's

[5] *See Moser v. Boatman*, 392 F. Supp. 270, 274 (E.D.N.Y. 1975) (personal jurisdiction existed where defendants, in two short meetings in forum state, "were actively involved in at least preliminary . . . contractual negotiations in [forum state] where agreement on at least a number of the essential

(Footnote continued on following page)

version of the luncheon meeting, the discussion resulted in agreement on important terms of the arrangement, this contact with Illinois was very significant.

Even if we credit Gourlay's version of the luncheon meeting, his conduct amounted to circumspect solicitation of business from Neiman. Gourlay, by his own account, conferred with Neiman at the October 14 meeting about cash-and-carry silver transactions Neiman proposed to make. Gourlay explained the transactions to Neiman with a view to interesting Neiman in engaging in the transactions, although cautioning him to do so only if they would suit Neiman's tax and financial objectives.

Whichever version we credit, when the luncheon meeting is considered with Gourlay's solicitation of Casselman and other ACLI brokers in late 1973 or early 1974, Gourlay's conduct in Illinois was sufficient to permit the district court to exercise personal jurisdiction over Gourlay and his principal, Wolff. Gourlay's statements to the brokers when he called on Casselman at ACLI were plainly aimed at interesting them in securing investors in silver transactions on the London Silver Market from which he and Wolff would make a profit. His statements to Neiman had the same purpose. This purpose was achieved: numerous transactions were entered into, among them the seven Neiman transactions out of which the claims at bar arose. The efforts of

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[5] *continued*

terms was apparently reached."); *Mendelson v. Fleischmann*, 386 F. Supp. 436 (S.D.N.Y. 1973); *ECC Corp. v. Slater Elec., Inc.*, 336 F. Supp. 148 (E.D.N.Y. 1971). *But see Viers v. Mounts*, 466 F. Supp. 187, 191 (W.D. Va. 1979).

When a meeting in the forum state has been viewed as an insignificant portion of the negotiations concerning only minor details of the agreement, however, it has been held not to be sufficient to give a court personal jurisdiction over a defendant. *See National Spinning Co. v. Talent Network, Inc.*, 481 F. Supp. 1243 (S.D.N.Y. 1979); *Luxury Air Service, Inc. v. Cessna Aircraft Co.*, 78 F.R.D. 410 (N.D. Ga. 1978); *Verner v. Moran Towing & Transp. Co.*, 258 F. Supp. 169 (S.D.N.Y. 1966).

Gourlay to obtain orders through brokers in Illinois from customers generally, and not merely from Neiman, and the resulting orders placed by brokers for customers other than Neiman are relevant to the due process issue under the Supreme Court's analysis in a tort context in *World-Wide Volkswagen, supra.*[6] The Neiman transactions were "not simply . . . isolated occurrence[s], but [arose] from the efforts of [Wolff] to serve, directly or indirectly, the market for its product in other States." 100 S. Ct. at 567. Moreover, Neiman's orders themselves cannot be regarded as a casual, fortuitous result of Gourlay's two trips to Illinois.[7] Neiman

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[6] *See Hardy v. Pioneer Parachute Co.*, 531 F.2d 193, 195 (4th Cir. 1976) ("No unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action."); *Stephenson v. Jordan Volkswagen, Inc.*, 428 F. Supp. 195 (W.D.N.C. 1977). Perhaps going a bit further is *Restatement (Second) of Conflict of Laws* § 36, Comment e (1971) (§ 36 is provision for individual defendants parallel to § 49 for nonresident corporate defendants, which is applicable here):

> It is . . . reasonable that a state should exercise judicial jurisdiction over a foreign [corporation] as to causes of action arising from an act done . . . in the state for pecuniary profit and having substantial consequences there even though the act is an isolated act not constituting the doing of business in the state.

See also Vencedor Mfg. Co. v. Gougler Indus., Inc., 557 F.2d 886, 891 (1st Cir. 1977) (Coffin, C.J.) ("After *McGee* [*v. International Life Ins. Co.*, 355 U.S. 220 (1957)] it seems fair to say that one who solicits in a state may be sued there if the transaction he has sought goes sour."); *Sahatjian v. Woodlets, Inc.*, 466 F.Supp. 945 (D. Mass. 1979); *cf. also Peebles v. Murray*, 411 F.Supp. 1174, 1178 (D. Kan. 1976) (transaction of business for purposes of long-arm statute occurs "when an individual is within or enters this state in person or by agent and, through dealing with another within the state, effectuates or attempts to effectuate a purpose to improve his economic conditions and satisfy his desires.").

[7] Thus, this case is unlike *Kaye-Martin v. Brooks*, 267 F.2d 394 (7th Cir.), *cert. denied*, 361 U.S. 832 (1959). *See Scovill Mfg. Co. v. Dateline Elec. Co.*, 461 F.2d 897, 900 (7th Cir. 1972).

placed the orders through Gourlay with Wolff as a result of Gourlay's activities in Illinois. Those activities were an important factor in the formation of the contracts out of which plaintiff's contract claim arises.[8] Accordingly, Gourlay's activities in Illinois were substantial enough and important enough to the subject matter of the action to satisfy the minimum contacts requirement of due process.[9]

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[*] The interest of the forum state and convenience, two factors not explicitly discussed in text, are often considered as part of a due process minimum contacts analysis. *See Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965); *Restatement (Second) of Conflict of Laws* § 36, Comment e (1971) (§ 36 is parallel to § 49, which is applicable here). However, these have been viewed as secondary factors. *Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 456 n.10 (8th Cir. 1977). In the case at bar the former, which depends upon the relation of the plaintiff to the forum state, favors the exercise of jurisdiction here since Neiman is an Illinois resident. Although it may be inconvenient for defendants, an English corporation and citizen, to defend in Illinois, it would also be inconvenient for plaintiff to sue overseas. Given defendants' purposeful acts in Illinois, we do not find any inconvenience to amount to a denial of due process.

Similarly, even though the fact that forum state law is to govern a contract is often viewed as a factor favoring personal jurisdiction, we do not find that the fact that these sales were, according to the conditions printed on the reverse side of the confirmation notices, apparently to be governed by the rules and regulations of the London Silver Market requires us to deny personal jurisdiction.

[9] *See Scovill Mfg. Co. v. Dateline Elec. Co.*, 461 F.2d 897 (7th Cir. 1972) (in contract action, personal jurisdiction existed over defendant-seller, where defendant started attending semiannual trade show in forum state in 1967, where discussions on sale began at July 1968 show, where negotiations elsewhere completed the contract, and where further discussions about details of production occurred at January 1969 and July 1969 trade shows). *See also Bastille Properties, Inc. v. Hometels of America, Inc.*, 476 F. Supp. 175, 176-77 (S.D.N.Y. 1979); *American Contract Designers, Inc. v. Cliffside, Inc.*, 458 F.Supp. 735 (S.D.N.Y. 1978); *Xedit Corp. v. Harvel Industries Corp., Fidelipac*, 456 F. Supp. 725, 727-28

(Footnote continued on following page)

III.

Plaintiff alternatively asserts a tort claim labeled as common-law fraud but described as a conspiracy between Gourlay and Wolff "to deprive Neiman of the benefits of his contracts with Wolff." Whether the tort claim is treated as a fraud claim or as a redundant claim for inducing breach of contract, no facts have been pleaded or shown elsewhere to support the claim or jurisdiction over it. The order of dismissal is affirmed with respect to the tort claim, without prejudice to plaintiff's right to seek to amend the pleadings to conform to the proof if

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[9] *continued*

(S.D.N.Y. 1978); *Northwest Animal Hospital, Inc. v. Earnhardt*, 444 F. Supp. 10 (W.D. Okla. 1977); *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F.Supp. 424 (M.D.N.C. 1977); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 374 F.Supp. 184 (D. Del. 1974); *H.K. Corp. v. Lauter*, 336 F.Supp. 79 (N.D. Ga. 1971).

This case is distinguishable from *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 999-1000 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). The main difference between *Bersch* and the case at bar is that Neiman's orders were the purposeful objective of both Gourlay's earlier visit to Casselman and his luncheon meeting with Neiman. In *Bersch*, no connection was shown between the earlier solicitation trip and the later grant of the IOS Canadian underwriting to Crang. Also, at least the first breakfast meeting was not set with the IOS underwriting in mind. In addition, the New York long-arm statute, unlike that of Illinois, does not reach to the full extent permitted by constitutional due process. *Compare Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965), *cert. denied*, 382 U.S. 905 (1966) *with Braband v. Beech Aircraft Corp.*, 72 Ill.2d 548, 557, 21 Ill. Dec. 888, 892, 382 N.E.2d 252, 256 (1978), *cert. denied*, 442 U.S. 928 (1979) (quoting *Nelson v. Miller*, 11 Ill. 2d 378, 389, 143 N.E.2d 673, 679 (1957)).

Defendants also urge that we follow *Wessel Co. v. Yoffee & Beitman Management Corp.*, 547 F.Supp. 939, 941 (N.D. Ill. 1978), and find that the facts here constitute not "the transaction of business in Illinois [but] the transaction of business with an Illinois [resident]." *Wessel Co.* is clearly distinguishable, however, since the only contacts defendant had with Illinois were interstate phone calls and mail concerning the transaction at issue.

evidence adduced later shows the existence of a claim in tort as to which defendants are subject to Illinois long-arm jurisdiction.

The judgment is affirmed with respect to the tort claim and reversed with respect to claims sounding in contract as to defendants Gourlay and Wolff, and the case is remanded for further proceedings consistent with this opinion. The judgment is affirmed as to defendant Ingleram. Plaintiff shall recover one-half of its costs against Gourlay and Wolff. Ingleram shall recover its costs against plaintiff.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4512—Midwest Law Printing Co., Inc., Chicago—4-23-80—350

District Court Opinion

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN d/b/a LONDON GROUP (1974),	)	
Plaintiff,	)	
v.	)	No. 75 C 2531
RUDOLF WOLFF & CO., LTD., an English Corporation; INGLERMAN INVESTMENTS, LTD., an English Corporation; and JAMES GOURLAY,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant Rudolf Wolff & Co., Ltd.'s ("Wolff") Motion to Dismiss pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure. Jurisdiction is invoked pursuant to 28 U.S.C. §§1331 and 1391.

DISTRICT COURT OPINION

Plaintiff is a citizen and resident of the United States and the State of Illinois. Defendant Wolff is a corporation incorporated under the laws of the United Kingdom, and is a resident of London, England, and the State of New York. Defendant acts as a broker and principal in London metal trading.

Plaintiff seeks damages for defendant's alleged nonperformance of certain London silver bullion contracts and for common law fraud. Plaintiff contends that many of the activities giving rise to his claim took place in Illinois. Plaintiff seeks to assert personal jurisdiction over defendant under the Illinois long arm statute, Ill. Rev. Stat. ch. 110, §17.

Defendant asserts that all meaningful contacts concerning the transaction in question occurred in London and that it transacted no business in Illinois sufficient to satisfy the "minimum contacts" test set forth in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), and Hanson v. Denckla, 357 U.S. 235 (1958). Defendant therefore moves to dismiss pursuant to Rule 12(b)(2), asserting the lack of personal jurisdiction.

In order for long-arm jurisdiction to exist the foreign defendant must have voluntarily performed some act by which it intentionally availed itself of the privilege of conducting activities within Illinois or by which it may be said to have invoked the benefits and protection

of Illinois law. Defendant must have "done business" here to such an extent that it would be equitable to require it to defend in this state. See, E. Walton & Co., Inc. v. Interastra, S.A., 67 F.R.D. 410, 411 (N.D. Ill. 1975).

There is no set formula or rule of thumb for determining whether there are sufficient minimum contacts short of ascertaining what is fair and reasonable in the circumstances of a particular case. Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481 (7th Cir. 1968). Some of the aspects courts have considered when determining the presence or lack of minimum contacts are whether defendant has offices or does business in the state, solicits clients, has a telephone listing, or sends mail or

makes telephone calls into the state.

Defendant contends it is not authorized to do business in Illinois, has no offices in Illinois, does not advertise or solicit clients in Illinois, and has no telephone listing in the state. Defendant supports these statements with the affidavit of its Secretary, Francis Holford. Defendant admits for purposes of this motion that a second defendant, James Gourlay, purported to be defendant Wolff's agent. Defendant Wolff contends the fact that trading in London silver was "generally discussed" by Gourlay and plaintiff at a Chicago luncheon does not cure the jurisdictional deficiency.

Plaintiff counters that Gourlay "negotiated every aspect of the trades which are the subject of this litigation,"

at the luncheon and that those actions constituted solicitation of business in Illinois. Plaintiff supports this allegation with his own deposition and affidavit, relying in particular on his statement that he was told by a broker for a member company of the Chicago Board of Trade that one of the purposes of Gourlay's visit to Chicago was to discuss changes plaintiff wished to make in certain standard documents presented to plaintiff by this broker.

Both parties rely on plaintiff's deposition to support their characterization of the discussion during the October, 1974 luncheon. Thus, the Court is faced with a dispute as to the interpretation of undisputed statements.

DISTRICT COURT OPINION

Assuming arguendo that preliminary negotiations occurred at the luncheon, the Court must also decide whether those negotiations were "substantial." See Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 91 (2d Cir. 1975).

The Court finds that plaintiff's testimony concerning the luncheon does not clearly establish that a "lengthy negotiating session" occurred. The overall picture of the luncheon presented by plaintiff's own deposition is not sufficient to establish substantial negotiations by which defendant invoked the benefit and protection of Illinois law. Moreover, plaintiff did not state in his deposition that the meeting was Gourlay's sole purpose for being in Illinois.

DISTRICT COURT OPINION

Plaintiff further argues that even if jurisdiction in the case must be gleaned from letters, telegrams and phone calls there are sufficient contacts to confer jurisdiction without offending traditional notions of fair play and substantial justice inherent in due process. For purposes of this argument this Court disregards all communications initiated by plaintiff from Illinois. It is the acts of defendant which are relevant, not the unilateral actions of plaintiff. See Rosenthal v. Dodick, 365 F. Supp. 847, 850 (N.D. Ill. 1973). Defendant's only communications to this state were confirmations of executed transactions which defendant sent to Illinois, and a telex cable from defendant.

DISTRICT COURT OPINION

Since the gravamen of plaintiff's Complaint is that defendant failed to deliver silver bullion to plaintiff in London, this Court finds that the contacts asserted above do not sufficiently show that defendant invoked the benefit and protection of Illinois law.

CONCLUSION

Accordingly, the Motion to Dismiss of defendant Rudolf Wolff & Co., Ltd., is hereby granted.

ENTER: _____
Alfred Y. Kirkland,
Judge

Dated: March 16, 1978

District Court Opinion On Reconsideration

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

David Neiman v. Rudolf Wolff & Co., Ltd., et al. April 20, 1979 75 C 2531

Plaintiff's Motion for Reconsideration is denied.

Plaintiff has presented no new evidence sufficient to change this Court's opinion of March 16, 1978 that defendant Wolff is not doing business in Illinois. Defendant is not authorized to do business in Illinois, and plaintiff's evidence fails to disclose any continuous and systematic business activity in Illinois by defendant. Although the depositions submitted by plaintiff show that a large volume of business was transacted between Illinois

residents and defendant, they do not establish that defendant had systematic contacts with this state as a result of that business. Rather, the depositions indicate that all but one of the Illinois residents solicited defendant to be their executing broker for London commodities transactions.

Plaintiff also has failed to establish that his cause of action arose out of the transaction of business in Illinois by defendant. See Ill. Rev. Stat. Ch. 110 §17(1)(a). The fact that plaintiff asked a "jillion questions" of defendant at a luncheon in Illinois does not change this Court's earlier determination that substantial negotiations did not occur at that luncheon, and that the luncheon did not amount to an adequate jurisdictional contact by defendant.

Finally, plaintiff's argument that defendant committed a tort in Illinois simply because an injury to plaintiffs "pocketbook" occurred in Illinois is without merit. Even assuming for purposes of this motion that plaintiff's alleged injury was caused by defendant's activity, the situs of injury alone is not in this case a sufficient minimum contact by defendant to subject defendant to this Court's jurisdiction.

Accordingly, plaintiff's Motion for Reconsideration is denied.

JUDGMENT OF COURT OF APPEALS

Opinion by Judge Tone

United States Court of Appeals 13

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Rec'd	4
Served	
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rehearing	5
BY	

April 23, 1980

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

DAVID NEIMAN d/b/a LONDON GROUP (1974),
Plaintiff-Appellant,

Nos. 79-1622 and 79-1802

RUDOLF WOLFF & CO., LTD., JAMES GOURLAY and INGLERAM INVESTMENTS, LTD.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinoi
Eastern Division
No. 75-C-2531
Thomas R. McMillen

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART; REVERSED AND REMANDED IN PART, in accordance with the opinion of this court filed this date. Plaintiff shall recover one-half of its costs against Gourlay and Wolff. Ingleram shall recover its costs against plaintiff.

A27
ORDER DENYING REHEARING

EP

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 22, 1980.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge *

Hon. _____

DAVID NEIMAN, d/b/a/ LONDON GROUP (1974),
Plaintiff-Appellant,
Nos. 79-1622, 79-1802 vs.
RUDOLF WOLFF & CO., LTD, JAMES GOURLAY and INGLERAM INVESTMENTS, LTD.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-C-2531
Thomas R. McMillen, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellee Rudolf Wolff & Co., Ltd., no judge in active service has requested a vote thereon, and all of the judges on the original panel* have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The panel which decided the appeal consisted of Judges Cummings, Sprecher and Tone. The petition for rehearing has been considered and acted upon by the judges remaining on the panel after April 30, 1980, the effective date of Judge Tone's resignation.

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A28
FIRST AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN d/b/a LONDON GROUP (1974), Plaintiff,	)	
vs.	)	No. 75 C 2531
RUDOLF WOLFF & CO., LTD., an English corporation; INGLERMAN INVESTMANTS, LTD., an English corporation; and JAMES GOURLAY, Defendants.	)	

FIRST AMENDED COMPLAINT

Plaintiff, DAVID NEIMAN d/b/a LONDON GROUP (1974) ("Neiman"), by his counsel, complains of defendants as follows:

FIRST CLAIM FOR RELIEF

Jurisdiction

1. This is a complaint for breach of contract and for common law fraud. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1391. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. Many of the material acts giving rise to the various claims for relief took place in the Northern District of Illinois, Eastern Division.

FIRST AMENDED COMPLAINT

Parties

2. Plaintiff, David Neiman d/b/a London Group (1974), is a citizen and resident of the United States, the State of Illinois and the City of Chicago.

3. Defendant, Rudolf Wolff & Co., Ltd. ("Wolff"), is a corporation incorporated under the laws of the United Kingdom, and is a resident of London, England, and of the State of New York. Wolff is a broker engaged in trading on the London Silver Market and acts as a principal in the purchase and/or sale of silver on the London Silver Market.

4. On information and belief, defendant, Inglerman Investments, Ltd. ("Inglerman"), is a corporation incorporated under the laws of the United Kingdom and is a resident of London, England.

5. Defendant, James Gourlay ("Gourlay"), is a citizen of unknown nationality, and is a resident, on information and belief, of London, England. Gourlay is now or was from November, 1974, through July 31, 1975, a shareholder, agent, representative, employee of, or affiliated with, both Wolff and Inglerman.

Facts

6. On or about August or September of 1974, Neiman asked William Casselman ("Casselman"), a broker for Stotler & Company, a large trading and clearing member of the Chicago Board of Trade, for information about trading in silver bullion, in which Mr. Casselman and Stotler & Company

were then actively engaged.

7. Casselman described to Neiman the mechanics of the silver trading he was engaging in and stated that the trading was accomplished through Wolff. Casselman further stated that he had been an employee of Wolff in London and he was in large part responsible for designing the mechanics of this particular type of trade, which had certain tax advantages in terms of interest deductions and capital gains treatment on income for those engaging in such trading.

8. On October 14, 1974, Neiman met with Casselman and Gourlay in Chicago, Illinois. At the meeting, Casselman introduced Gourlay as a principal of Wolff who would supervise the implementation of Neiman's silver contracts. Thereupon, Neiman agreed to purchase and to sell silver bullion through Wolff. At the meeting, it was agreed that the trades were to be financed by I. Rochester (Finance) Limited ("Rochester"), a United Kingdom corporation which finances transactions in silver to customers of Wolff, for a commercial bank in the United States and that Gourlay would arrange for the financing.

9. The trades contemplated are known as "cash and carry" hedge transactions. In theory, they contemplate the purchase of a certain amount of silver bullion for immediate delivery ("spot purchase") and the sale of the identical amount of silver bullion for delivery at a future date, usually six or more months hence, in anticipation that the

forward sale would qualify as a long-term capital gain to the trader. The price at which the "forward" sale is made is slightly higher than the purchase price ("spot price") to cover carrying (i.e., storage, insurance and interest) charges between the date of delivery and the date of sale.

10. With respect to the specific transactions between Neiman and Wolff, the initial purchases were to be financed 100% by Rochester, which was to pay the money directly to Wolff. Neiman would then owe Rochester the interest on the loan. Wolff and Rochester agreed that the payment of this interest could be financed by a bank in the United States with which Wolff represented that Wolff and Rochester already had previous arrangements. The interest was to be loaned to Neiman, paid by Neiman to Rochester, through its account at the aforesaid United States bank, and Neiman was to be out-of-pocket for only that amount which he borrowed from the United States bank for interest on its loan made for the purpose of paying interest to Rochester. The difference in the price of silver on the forward contract would offset the cost of the interest to Neiman, leaving Neiman out-of-pocket only for brokerage fees to Wolff, which fees were to be computed by a stated percentage of the interest to be paid.

11. In theory, the above described hedge transaction could have different results:

(a) If the transactions were consummated at maturity, Neiman's sale and purchase of

the silver would result in an income tax deduction for interest paid and an offsetting capital gain. Thus, Neiman's risk in the transaction was limited;

(b) If, for any reason, the "spread" between the purchase price of the spot purchase and the forward sale price narrowed for reasons other than the passage of time, profits would be realized because the spot price and the cost of covering the forward contract normally do not rise at the same rate; and

(c) If the "spread" widens between the price of the spot purchase and the forward sale price for reasons other than the passage of time, then the contracts are allowed to run to maturity with the attendant assured results.

12. Pursuant to the agreement reached as alleged in ¶8, and on or about November 22, 1974, November 26, 1974, November 27, 1974, February 24, 1975 (confirming an order of January 27, 1975, for delivery on January 29, 1975), and March 11, 1975, Neiman and Wolff entered into agreements in writing for the purchase and sale of silver bullion, written confirmations of which are attached hereto as Exhibits A, B, C, D, E and F.

13. Each of the above purchases was purportedly financed by Rochester.

14. During March, 1975, the "spread" between the

purchase price of the spot purchase and the sales price narrowed and, Neiman, while in London, England, on other business met with Gourlay on March 26, 1975, at Wolff's London offices to advise Gourlay that Wolff would shortly be instructed to sell the spot silver owned by Neiman and to follow Neiman's instructions with respect to covering his forward contracts.

15. Although Neiman had the right to give the instructions referred to in ¶14 to Wolff, Wolff refused to follow said instructions and confirmed said refusal by letter on April 10, 1975.

16. Neiman continued to negotiate with Wolff in an attempt to work out an agreement whereby Wolff would perform its obligations and sell or permit Neiman to sell his spot silver and permit him to provide covering contracts on his forward contracts.

17. On April 11, 1975, Neiman again instructed Wolff, immediately to deliver his spot silver and to permit him to provide cover on his forward contracts, either through Wolff or another London brokerage firm.

18. Wolff refused to obey Neiman's instructions.

19. As a result of the failure of Wolff to follow Neiman's instructions, Neiman has been damaged in an amount in excess of $3,197,000 representing lost profits which would have accrued to Neiman if Wolff had followed Neiman's instructions, sold his spot purchases and permitted Neiman

to provide cover on his forward contracts. Neiman was further damaged in that significant profits in excess of $7,300,000 due to currency fluctuation of which he was unable to take advantage were denied him because Wolff failed to follow his instructions.

WHEREFORE, Neiman demands:

(a) That judgment be entered in his favor and against Wolff in an amount equal to at least $10,497,000; and

(b) That judgment be entered in his favor and against Wolff for the costs of this action, together with such other and further relief as this Court deems just and equitable.

SECOND CLAIM FOR RELIEF

20. This Claim for Relief against Gourlay and Inglerman is pleaded in the alternative for breach of warranty of authority and for breach of contract.

21-40. Neiman repeats and realleges Paragraphs 1 through 19 of the First Claim for Relief as Paragraphs 21 through 40 of the Second Claim for Relief.

41. According to Wolff, Gourlay was, at all times relevant hereto an employee, officer, and/or owner of Inglerman and was not an employee, officer, or agent of Wolff.

42. On information and belief, according to Wolff, Gourlay and/or Inglerman exceeded their authority to represent Wolff in dealing with Neiman.

43. Neither Gourlay nor Inglerman informed Neiman that he and/or it only had limited authority to represent

Wolff and that in dealing with plaintiff, he and/or it exceeded its authority.

44. If and to the extent Wolff is not liable to Neiman because Wolff was not bound by the representations and conduct of Gourlay and/or Inglerman, then Gourlay and/or Inglerman are liable to plaintiff for breaching their warranty of authority to Neiman that they had authority to represent and bind Wolff.

WHEREFORE, Neiman demands:

(a) That judgment be entered in his favor and against Gourlay and Inglerman in an amount equal to at least $6,375,000; and

(b) That judgment be entered in his favor and against Gourlay and Inglerman for the costs of this action, together with such other and further relief as this Court deems just and equitable.

THIRD CLAIM FOR RELIEF

45. This claim for relief against Gourlay and Wolff is based in the doctrine of apparent authority and/or estoppel.

46-65. Neiman repeats and realleges Paragraphs 1 through 19 of the First Claim for Relief as Paragraphs 46 through 65 of the Third Claim for Relief.

66. Gourlay held himself out as a principal or agent of Wolff and Wolff permitted Gourlay to so hold himself out by providing Gourlay with office space at

Wolff's London office with no separate identification, but seemingly part of Wolff's business, providing Wolff stationery for Gourlay to use, allowing Gourlay to be reached as a matter of course at Wolff's telephone and telex number without in any way advising callers that Gourlay was not a principal or agent of Wolff, and in other ways.

67. A reasonable person would have assumed Gourlay was a principal or agent of Wolff based on the facts alleged in paragraph 66, and Neiman did so assume and did rely on the reputation of Wolff, and thus Wolff's principals and agents.

68. As a result of Neiman's reliance on Wolff's reputation, Neiman entered into the silver transactions alleged herein with Wolff, through Gourlay.

69. Gourlay had apparent authority to act for and on behalf of Wolff, and neither Wolff nor Gourlay may now deny such authority.

70. By entering into the silver transactions arranged by Gourlay for Neiman Wolff ratified Gourlay's already sufficient apparent authority.

71. Gourlay and Wolff, additionally, must be, on the facts alleged herein, estopped to deny that Gourlay was a principal or agent of Wolff.

WHEREFORE, Neiman demands:

(a) That judgment be entered in his favor and against Wolff and Gourlay in an amount equal to at least $10,497,000; and

(b) That judgment be entered in his favor and against Wolff and Gourlay for the costs of this action, together with such other and further relief as this Court deems just and equitable.

FOURTH CLAIM FOR RELIEF

72. This claim for relief is for common law fraud.

73-96. Neiman repeats and realleges as Paragraphs 73 through 96 of the Fourth Claim for Relief Paragraphs 1 through 19 of the First Claim for Relief and Paragraphs 41 through 44 of the Second Claim for Relief.

97. Wolff, Gourlay and Inglerman wilfully and maliciously and in bad faith conspired to deprive Neiman of the benefits of his contracts with Wolff.

WHEREFORE, Neiman demands:

(a) That judgment be entered in Neiman's favor and against Wolff, Gourlay and Inglerman, jointly and severally, for compensatory damages in the amount of $10,497,000 and for punitive damages in the amount of $20,996,000; and against Wolff, Gourlay, and Inglerman, jointly and severally, for the costs of this action,

together with such other and further relief as this Court may deem just and equitable.

Martha M. Jenkins
One of the Attorneys for Plaintiff

JAMES P. CHAPMAN
33 North Dearborn Street
Chicago, Illinois 60602
263-0789

MARTIN M. PHILIPSBORN
11 South LaSalle Street
Chicago, Illinois 60603
236-7103

EDWARD T. JOYCE
MARTHA M. JENKINS
77 West Washington Street
Chicago, Illinois 60602
726-3360

OF COUNSEL:

JAMES P. CHAPMAN, LTD.
EDWARD T. JOYCE, LTD.

DEPOSITION TRANSCRIPT - DAVID NEIMAN

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN, doing business as THE LONDON GROUP (1974), Plaintiff,	)	
-vs-	)	No. 75 C 2531
RUDOLF WOLFF AND CO., LTD., Defendant.	)	

The deposition of DAVID NEIMAN, called by the Defendant for examination, pursuant to Notice and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before GERALYN M. DUDZIK, a notary public within and for the County of Cook and State of Illinois, at 115 South LaSalle Street, 31st Floor, Chicago, Illinois, on the 18th day of May, A.D., 1977, at the hour of 10:00 o'clock A.M.

APPEARANCES:

MR. EDWARD T. JOYCE,

Appearing on behalf of the Plaintiff;

MESSRS. BURKE & BURKE, DANIELS, LEIGHTON & REID,
BY: MR. ELLIOT PASKOFF,

Appearing on behalf of the Defendant.

. . .

substance than Mr. David Neiman, an individual; and accordingly, their understanding of what the London Group was prior to the engagement or execution of these transactions is critical, and I think it's quite relevant, and it is made more relevant by correspondence and communications between the law firm of Gottlieb & Schwartz and my client; and accordingly, I request that these documents be produced. I don't think I can hold a meaningful deposition with a partial document production.

MR. JOYCE: We will produce them but not because they are relevant, not because they are called for; just to let this deposition start and end; that's all.

MR. PASKOFF: I appreciate your gratuity.

BY MR. PASKOFF:

Q Mr. Neiman, do you have your Federal Income Tax Returns for the years 1972, 1973, 1974, 1975 and 1976 with you?

A No.

MR. JOYCE: Again, We'll object on the grounds of relevancy to those documents.

BY MR. PASKOFF:

Q Did you file Federal Income Tax Returns for the years 1972 through and including 1976?

A No.

Q Did you file income tax returns with the State of Illinois?

A No.

Q Did you file estimated earnings for the years '72 through '76 with the Federal Government?

A No.

Q It is your testimony today for the years 1972 through and including 1976 you have not filed any Federal Income Tax Returns or State?

A That's correct.

Q When was the last year that you filed an income tax return with the Federal Government?

MR. JOYCE: I would direct him not to answer that question because there is no question anything he did before 1972 is relevant. I don't think '72, '73 is relevant to this lawsuit.

BY MR. PASKOFF:

Q Have you ever filed a Federal Income Tax Return?

A Yes.

Q How old are you, Mr. Neiman?

A Fifty-two.

Q Are you a high school graduate?

A Yes.

. . .

A The contemplation that an entity would be formed or might be formed.

Q Have you completed your answer?

A Yes.

Q Mr. Neiman, did you have any gross income during the calendar year 1972?

MR. JOYCE: I object to the question, and I instruct the witness not to answer. You have asked that question specifically with respect to '72, '73 and '74 for about two hours yesterday. He has answered the question.

BY MR. PASKOFF:

Q Mr. Neiman, did you have any gross income for the year 1975?

A Would you define "Gross income"?

Q Did you have any income for the year 1975?

A Would you define "Income"?

Q I will define income as for the purpose of my question as monies which are flowing to David Neiman as a result of some form of employment.

A No.

Q Did you have any income for the year 1976?

A No.

Q During the year 1972, did you complete a

. . .

BY MR. PASKOFF:

Q Fine. Mr. Neiman, did you ever meet within the United States a person known as James Gourlay?

A I did.

Q How many times did you meet Mr. Gourlay in the United States?

A Once for a very long, long lunch.

Q What was the date of that meeting?

A The 14th of October.

Q What year?

A 1974.

Q Where was that meeting held?

A I believe at Binyon's Restaurant.

Q Where is Binyon's Restaurant?

A Between Jackson Boulevard -- what's the street just west?

MR. JOYCE: It's on Plymouth Court.

BY MR. PASKOFF:

Q Is that in Chicago, Illinois?

A In Chicago.

Q Who arranged that meeting?

A William Kasselman.

Q What time did you first meet Mr. James Gourlay?

. . .

was also present?

A I am not sure.

Q What is your best recollection?

A I would say that that was my best recollection, but I am not positive of it.

Q At your luncheon meeting with Mr. Courlay and Mr. Kassellman, who first spoke about the subject of silver transactions?

A I don't recall.

Q Do you recall whether you asked Mr. Courlay any questions relative to trading silver on the London Bullion Market?

A Yes.

Q Do you recall what you asked him?

A Yes. I told him the standard form loan agreement was unacceptable, generally.

Q Who had brought up the subject of a standard loan form agreement?

A I had been given a copy of one.

Q By whom?

A By Mr. Kassellman.

Q When were you given that document? Did it precede --

A Some time in July, August, September.

. . .

What was your next communication with Mr. Kassellman relative to silver transactions with Rudolf Wolff? Was it face to face or over the telephone,-in writing, or by letter?

A I'm not sure, but I believe we had lunch again, Mr.Kassellman and myself; and I said, "Where are the changes to the documents, the loan documents?"

And, he said, "Look, I worked for Wolff & Company for many years, and they are so slow on their paper work as to drive you crazy, but they are good when they say they will do something, they will do it.

In terms of an actual silver transaction, I called Bill Kassellman someplace in Florida and placed one order one day and then some more another day and some more another day. Then, as I still was waiting for the document changes because I am getting the same documents that I objected to, and finally, Mr. Kassellman said, "Look, why don't you call James directly." He said, "It's very difficult to deal with him." He said, "Wolff & Company just is extremely slow on their paper work."

Q Mr. Neiman, in your testimony, you used the term "Documents",and previously you testified that there was a single document.

. . .

A I would assume that that is correct.

Q So that your instructions to Mr. Kasselman to cause a $150,000 interest deduction and seven mont' long term gain was the initial silver transaction engaged by David Neiman or the London Group to the best of your recollection?

A No, it resulted in that, but I made my own calculation, and said, "Put it within this frame-work." Kasselman did his own converting.

Q Prior to this framework of $150,000 interest deduction and seven month long term gain, you had not entered into any other silver transactions for spot or future with Rudolf Wolff & Company?

A No.

Q Do you recall whether Mr. Kasselman provided you with a copy of any letter or writin, which he may have sent to Rudolf Wolff?

A Yes.

MR. PASKOFF: I want to ask you to mark this Plaintiff's Exhibit No. 9, for identification.

(Document marked as requested.)

BY MR. PASKOFF:

Q Mr. Neiman, I show you a copy of a letter dated November 6, 1974 on the letterhead of Stotler &

Company, Stewart National Bank Building, Stewart, Florida, from William E. Kasselman to James Gourlay which says, "Dear James, For the London Group 1974, care of David Neiman," with your address "Work out a $150,000 interest deduction and a seven month long term gain" -- will you please look at this document, Mr. Neiman?

A Yes. There is only one exception to that. It's addressed to James Gourlay, Rudolf Wolff & Company

Q Well, I am sure the document will be part of the record so that there is no problem how it's addressed.

A Correct.

Q So that document represents the first writte communication confirming your initial transaction with Rudolf Wolff & Company in London?

A No, sir.

Q What does that represent?

A That represents instructions to Wolff & Company to do something. That's no confirmation at all. This is worthless as it sits by itself.

Q All right,.Mr. Neiman, you did authorize Mr. Kasselman to so instruct Rudolf Wolff & Company in London, is that correct?

A I did. I did.

Q Have you seen the handwriting?

A I have.

Q Was that handwriting on that document when you received it?

A Yes.

Q Were you to receive a commission for placing this business from Rudolf Wolff & Company?

A I thought of it but on advise of Counsel, they said "Don't do it. Do not receive any commission because in the future it could prevent a conflict of interest."

Q Mr. Neiman, I am asking you what your arrangement was or rather your instructions were to Mr. Kassellman at the time that you advised him to communicate with Rudolf Wolff?

A That is correct.

Q When you say, "That is correct," can you tell me what those instructions were? Were your instructions that you were to receive a three percent commission on the initial transaction?

A Correct.

Q When did you first advise either Mr. Kassellman or someone else that you, David Neiman,

. . .

Group 1974 would purchase 1,008,000 ounces of silver?

A Correct.

Q When was that determination made?

A In December, I believe.

Q I ask you the same question with respect to the purchase of 2,139,000 ounces of silver; did you make that determination?

A The exact number of ounces?

Q Yes, sir.

A Is that what you have been asking me all through here?

Q Yes, sir.

A Then I have to change the answers.

Q Please do.

A The exact amounts were determined by Wolff & Company.

Q Based upon what instruction and from whom?

A On an approximate interest deduction for the period involved.

Q Could you describe in detail what you did and the method by which you issue instructions to either Mr. Kassellman or Rudolf Wolff & Company with respect to the transactions upon which your complaint is premised?

. . .

A To Mr. Kassellman.

Q Was that instruction with respect to the ultimate purchase or the purported purchase of 748,000 ounces of silver?

A Correct.

Q The next purchase seems to be one of 1,008,00[illegible] ounces of silver?

A Correct.

Q How was that information given to Rudolf Wolff? Was it through Mr. Kassellman?

A Through Mr. Kassellman.

Q The next purchase involves 2,000,13[illegible] ounces of silver. Was that through Mr. Kassellman?

A Correct.

Q The next purchase involves 1,000,3[illegible] ounce[illegible] of silver?

A That was not the next purchase.

Q What was the next purchase?

A 10,666,000 ounces.

Q How was that information given to Rudolf Wolff & Company?

A By telephone.

Q Did you call Rudolf Wolff & Company?

A Correct.

Q Where did you make that call from?

A I don't recall.

Q Was it from Chicago, Illinois?

A It was from Chicago.

Q Was it from your home?

A Possibly. It could have been from my home or from Mr. Ettlinger's office.

Q From that point on, did you then communicate with Rudolf Wolff & Company directly by telephone?

A By telephone and Tel-Ex.

Q Do you have copies of those Tel-Ex's that you sent to them with you?

A Yes.

MR. JOYCE: They have been delivered to you.

THE WITNESS: There are only two more transactions.

BY MR. PASKOPF:

Q Mr. Neiman, would you show me the Tel-Ex's which constitute the communications with Rudolf Wolff & Company from among the documents that you have produced?

A Let me see. The orders were given by telephone

Q So you are now telling me that you did not issue instructions by Tel-Ex but only telephone, instructions relative to the orders for spot purchase

and future sale?

A Correct. There are only two more. It was the 10,666,000 and the 1,365,000.

Q At the time you issued these instructions or caused instructions to be issued to Rudolf Wolff & Company, were your purchases of silver and future sales of silver contigent upon anything?

A No, sir.

Q In your own mind, did you feel obligated to complete those transactions with Rudolf Wolff & Company?

A Oh, yes.

Q At all times?

A At all times.

Q When did you determine that there would not be an offering of limited partnership interests in the London Group 1974?

A In March of 1975.

Q What caused you to make that determination?

A My evaluation that interest rates were going to fall and with the falling of the interest rates, there would be a profit for which there was no purpose in having any partners.

Q Are you saying that when there is a profit

. . .

Q Was Rudolf Wolff & Company, Ltd. ever apprise of the fact that the limited partnership was not so organized?

A No, not to my knowledge.

MR. JOYCE: I am going to object somewhat belatedly to the last two questions because it's rather clear from the record that some form of partnership was organized and dealt with Rudolf Wolff & Company.

MR. PASKOFF: Your objection is noted, but the witness' testimony is taken on its face.

BY MR. PASKOFF:

Q Mr. Neiman --

A May I add something to that?

Q Mr. Neiman, I would appreciate it if you would respond to my questions. You will have an opportunity to add anything you wish.

MR. JOYCE: Well, are you completing your answer?

THE WITNESS: I am completing my answer.

MR. JOYCE: He's permitted to complete his answer.

BY MR. PASKOFF:

Q You are completing your answer to what question?

A To your question whether or not an offering

was made.

Q That was not my question, but go ahead and complete your answer.

A The offering was never -- an offering, as I understand an offering under Rule 146, was never made.

Q But Mr. Neiman, was it your understanding in December of 1974 that the silver purchases and silver future sales made by the London Group 1974 with Rudolf Wolff or without obligation to either the London Group or yourself?

A It was clearly --

MR. JOYCE: What do you mean by "Obligation"?

MR. PASKOFF: That neither the London Group nor Mr. Neiman was obligated to complete those transactions.

MR. JOYCE: Okay, you can answer the question.

THE WITNESS: Absolutely. I was under obligation.

BY MR. PASKOFF:

Q Both with respect to the spot purchases and the future sales?

A Correct.

Q Mr. Neiman, did you authorize Mr. Bernard Weisberg of Gottlieb & Schwartz to write the Rudolf

Wolff & Company Ltd. and state "You have already effected certain of the contemplated silver purchases and silver future sales for the account of the partnership without, however, obligating the partnership or Mr. David Neiman, the proposed general partner, to complete such transactions unless the partnership is organized and then only to the extent the partnership raises capital as set forth above through the sale of limited partnership interest."

A I do not recall authorizing him.

Q Is there anyone else affiliated with the London Group 1974 that may have issued -- that you know issued those instructions to Mr. Weisberg?

A No.

Q Your statement that you do not recall, does that mean you have no recollection one way or the other or your present recollection leads you to conclude that you did not authorize him to make that statement?

A Well, I know I never would have written that letter.

Q Were you provided with a copy of that letter by Mr. --

A Yes, I was.

Q -- Weisbe :?

Did you protest to Mr. Weisberg relative to its contents?

A No.

Q Did you have any occasion to discuss the contents of that letter?

A No.

Q Were you given a copy of the letter of December 16, 1974 approximately around that date?

A Approximately, yes.

MR. PASKOFF: I would like to have the reporter mark as Plaintiff's Exhibit No. 10, for identification, a letter dated December 16, 1974 consisting of three pages with the typewritten signature of Cottlieb & Schwartz by Bernard Weisberg.

(Document marked as requested.)

BY MR. PASKOFF:

Q Mr. Neiman, I ask you to look at Plaintiff's Exhibit No. 10 and tell me whether this document constitutes the copy of the letter which you have received from Mr. Bernard Weisberg?

A Yes.

Q I ask you to look at Item 7 therein.

A Yes.

Q Tell me when was the first time that you

recall seeing this statement.

A When I received a copy of the letter.

Q Did you discuss that statement with Mr. Weisberg?

A No, not that I recall. Although, come to think of it, I did. Come to think of it, I did. I said "This is ridiculous."

Q When did you say that?

A When I talked to him.

Q Can you give me an approximate date?

A Some time in December.

Q Did he reply to your characterization?

A He said, "Well, let's just --" he said, "It's in there."

Q Did you ever send any follow-up communication to Rudolf Wolff?

A No.

Q Mr. Neiman, I show you what I will ask the court reporter to mark as Plaintiff's Exhibit No. 11 for identification which is a letter dated December 31, 1974 to Rudolf Wolff & Company Ltd. by Bernard Weisberg.

Have you seen that letter before, sir?

(Record marked as requested.)

THE WITNESS: Yes, I have.

BY MR. PASKOFF:

Q Was the Illinois limited partnership organized in 1975?

A No, the limited partnership, again, I get confused. The limited partnership that is referred to in there --

Q That's exactly what I am asking.

A Would be under the terms of a 146.

Q It was not organized?

A No.

MR. JOYCE: You are asking specifically about the partnership referred to in that letter?

MR. PASKOFF: Absolutely correct.

MR. JOYCE: All right.

BY MR. PASKOFF:

Q Was Rudolf Wolff & Company ever advised that the partnership as described in that letter dated December 31, 1974, was not organized?

MR. JOYCE: Reread that question.

(Record read as requested.)

THE WITNESS: Yes.

BY MR. PASKOFF:

Q When was Rudolf Wolff & Company so advised?

A For certain, when the suit was filed.

Q Prior to the filing of the instant litigation, do you recall, you or anyone else advised Rudolf Wolff & Company that the partnership was not organized as either set forth in the letter dated December 16th or its follow-up, the letter dated December 31, 1974?

A I am not sure.

Q During December of 1974, was it your intent to raise a million dollars by sales of limited partnership interest in the London Group 1974?

A Yes.

Q Correspondingly, was it your intent to purchase approximately $35 million worth of silver, spot silver in the London market and concurrently style an equal amount of silver for future delivery approximately seven months subsequent to the date of purchase?

A No, not necessarily.

Q Did you authorize Mr. Bernard Weisberg to state in his letter dated December 16, 1974, "If the partnership raises less than $1 million through the sale of limited partnership interest, then the amount

of silver purchases and sales will be reduced proportionately."

A I did not authorize that.

Q Did Mr. Weisberg dream this up?

MR. JOYCE: I object to the form of the question.

BY MR. PASKOFF:

Q Did you consult with Mr. Weisberg relative to the contents of this letter dated December 16th, 1974 before it was sent?

A I never saw the letter before it went out.

Q Mr. Neiman, when did you first receive a copy of the draft entitled "The commodities strategy group, an Illinois limited partnership."

A I don't recall. Some time, I believe, in December of '74. I think there is a date up on the top.

Q The date is 11/18/74.

A Then it would be within a couple days of that.

Q Mr. Neiman, what was the total amount of dollars raised by the entities known as the London Group 1974 prior to the date of the filing of this lawsuit?

MR. JOYCE: Which London Group are you referring to?

MR. PASKOFF: Are there two different entities

. . .

of this lawsuit and also described as the London Group 1974?

MR. JOYCE: The Plaintiff?

MR. PASKOFF: The Plaintiff in this lawsuit.

THE WITNESS: It's not the London Group 1974.

MR. JOYCE: Just refer to it as the Plaintiff and deal with it that way.

THE WITNESS: All right. The Plaintiff, I would say, about $35,000. It wouldn't dare attempt to raise any more. I am glad that's all that was raised..

MR. JOYCE: Mr. Neiman, there is no question pending.

BY MR. PASKOFF:

Q Mr. Neiman, when did you first decide -- strike that question.

Mr. Neiman, when did you first request that Rudolf Wolff & Company would deliver to you the spot silver that you purchased?

A I advised James Gourlay in March of 1975.

Q How was that advice communicated to him? Over the telephone?

A Face to face.

Q Did you meet with him in London, England?

A Yes. I had -- let me continue. I advised

him that within a very short period, we would want to take delivery and cover our short position.

Q Will you describe or explain what you mean by your "Short position"?

A Well, if you make a sale of something in a forward position, and you no longer have a spot position, you're short the forward position.

Q Are you using the term forward to equate the future obligation?

A Correct.

Q So that are you saying that once you no longer have the immediate silver, you still have an obligation to produce the silver in the future?

A Absolutely, that is, in trade terms. I don't think there is any contractual requirement, that is just the way you do business.

Q Did you arrange for the satisfaction of the indebtedness owed to I. Rochester finances on the spot purchase?

MR. JOYCE: When?

THE WITNESS: Spot purchases.

MR. JOYCE: When?

THE WITNESS: What date?

BY MR. PASKOFF:

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. . .

MR. JOYCE: Again, I will object to the form of the question since you don't have a time frame in it.

BY MR. PASKOFF:

Q Prior to the institution of this lawsuit.

A Besides the market, self-providing?

Q Yes, sir.

A Yes, I did.

Q With whom did you make that arrangement?

A Sharps-Pixley.

Q Is that the full name of the entity?

A No, that's a subsidiary of -- I forget the Merchant Bank.

Q Where is Sharps-Pixley located?

A In London.

Q With whom did you make those arrangements?

A I made those arrangements subject to the approval of Wolff. I believe the name is Mr. Edgar.

Q Can you tell me approximately when you made those arrangements, the approximate date?

A Some time in June.

Q Of what year?

A 1975.

Q Specifically what arrangements did you make

with Mr. Edgar?

A Specifically I explained what our positions were.

Q Did you provide him with confirmations?

A No, we just talked over the phone.

Q Were you in London at the time?

A I was.

Q Who introduced you to Mr. Edgar?

A I don't recall.

Q Do you know whether Mr. Edgar had a pedal like Sharps-Pixley?

A No, but he was head of the silver trading department.

Q Is Sharps-Pixley a brokerage firm?

A Among other things, yes. They are dealers and brokers.

Q Could you relate to me the substance of your conversation with Mr. Edgar?

A I explained the long hassle that had been going on since April, and I said, "I want to close the positions out. I have the confirmations. Will you handle it?"

Q Are you, sir, are you referring to the spot positions or the future positions?

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. . .

MR. JOYCE: If he sold it on the short side, they owe him money.

BY MR. PASKOFF:

Q What was the arrangement with Sharps-Pixley, Mr. Neiman?

A That if Wolff agreed, they would take over the positions for me and handle it as brokers.

Q So that Sharps-Pixley would then take over the forward or short?

A And handle the spot sales.

Q Did Mr. Edgar confirm that arrangement in writing?

A No.

Q Did you meet Mr. Edgar face to face to discuss it?

A No.

Q Was that the subject of the single telephone call?

A I think it was the subject of two telephone calls.

Q And, there is nothing in writing relating to this conversation with Mr. Edgar at Sharps-Pixley?

A No.

Q Was Mr. Edgar aware of the amount of British

DEP. TRANSCRIPT - DAVID NEIMAN

. . .

Q Did you engage counsel in London to represent you?

A I did.

Q Was that counsel known as Coward Chance?

A Correct.

MR. JOYCE: Mr. Neiman, make an audible response, if you would. You can't shake your head.

THE WITNESS: Yes.

BY MR. PASKOFF:

Q Did you authorize your counsel to write to the attorneys for Rudolf Wolff in substance and state, "Our clients will procure the immediate discharge of the interest of I. Rochester (finance) Ltd. in these positions by repaying all loans made by that company at the agreed premium of one percent."

A No, sir.

Q Did you authorize your attorney, Coward Chance, to write to the attorneys for Rudolf Wolff, "Full coverage of all short positions totalling 16,601,000 ounces will be provided to your client."

A Yes.

Q I show you a document which I will ask this court reporter to mark as Plaintiff's Exhibit No. 12. I will ask you to read the exhibit.

. . .

(Document marked as requested.)

THE WITNESS: The one percent they are referring to is on balance because they have the full record.

BY MR. PASKOFF:

Q Would you describe what you mean by that statement.

A Let's say you go into a bank and the typical practice on certain kinds of loans put a penalty to the prepayment. The penalty is on a per annum basis on the balance of the loan. You have been through it many times yourself.

Q Did you see that letter before it was sent out?

A No.

Q Did you authorize your attorney to send that letter?

A No.

Q You can see that Coward Chance was enraged by you as your attorney in London?

A Absolutely.

Q For the purpose of negotiating your interest with Rudolf Wolff & Company?

A Correct.

Q Is that correct, sir?

. . .

with Gourlay, Coward Chance, the counsel for Rudolf Wolff & Company, and the counsel for I. Rochester.

Q Did you mention to them the name Sharps-Pixley at that meeting?

A No, I mean, if you are going to give cover and you are in the business --

Q I am just asking you a simple question.

MR. JOYCE: He's giving you an answer.

Read back his answer.

(Record read as requested.)

THE WITNESS: One could go to Bache or Merrill Lynch or anybody and provide the cover.

BY MR. PASKOFF:

Q Mr. Neiman, did you go to Bache or Merrill Lynch to provide cover in these transactions?

A No, I just knew I could do it.

Q Did Rudolf Wolff & Company through their attorneys ask for the identity of the source of your covering the future transactions?

A No, not that I recall.

MR. PASKOFF: I'm going to ask the reporter to mark this as Plaintiff's Exhibit No. 13, for identification, which is a letter dated the 12th of June, 1975 from Radcliffes & Company to Messrs.

Coward Chance.

(Document marked as requested.)

THE WITNESS: Yes.

MR. JOYCE: I would like to look at that.

MR. PASKOFF: Mr. Joyce, the document that I have given to Mr. Neiman has come from the production which you made yesterday.

MR. JOYCE: Okay.

MR. PASKOFF: What is the last pending question?

MR. JOYCE: There is none. You just handed him the document.

MR. PASKOFF: May I see the document?

BY MR. PASKOFF:

Q Do you now recall whether Rudolf Wolff through their attorneys requested of you through your attorneys the identity of the source for the cover on the future positions?

MR. JOYCE: Rudolf Wolff is not represented by Radcliffes, are they?

MR. PASKOFF: Yes, they are.

THE WITNESS: Yes.

BY MR. PASKOFF:

Q Did you so inform Rudolf Wolff & Company through its attorneys of the identity of the entity

who you hoped would provide the cover on the future positions?

A No, not to my knowledge. They answered it, but I wouldn't attain to answer that letter.

Q Mr. Neiman, did you institute a lawsuit in London, England, against Rudolf Wolff & Company?

A No.

Q Did you threaten to institute a lawsuit against Rudolf Wolff & Company in London?

A Did I?

Q Did your counsel? You or your counsel?

A Threaten?

Q Yes, sir.

MR. JOYCE: Well, I will object to the use of the word, "Threaten". Did they make that statement?

BY MR. PASKOFF:

Q Did you advise through your attorneys Rudolf Wolff & Company Ltd. in London that unless they complied with certain demands that you would institute a legal proceeding in London, England?

A I am not sure.

Q Do you presently recall who introduced you to Mr. Edgar?

A No.

Q Had you done any business with Sharps-Pixley or Mr. Edgar prior to your telephone call?

A No.

Q How did you become aware of Mr. Edgar?

A I was familiar with Sharps-Pixley as one of the five members of the Bullion Silver Exchange. At that time there were only five, to the best of my knowledge. Well, people will deal with them, but there are only five members, and I don't recall how or whom, but I know who was friendly with the vice-president of the New York branch of the bank of which Sharps-Pixley is a subsidiary.

Q Did you make any notes or writing of your conversation with Mr. Edgar?

A No, just his name and address.

Q Do you have that writing with you?

A No.

Q Is that contained in your file at home?

A I believe that's in my diary.

MR. PASKOFF: Unequivocally, Mr. Joyce Mr. Neiman's diary is called for in the Notice of Production.

MR. JOYCE: We will not object to producing it, but I don't believe it's called for under any stretch of the imagination.

MR. PASKOFF: Without burdening the record to the extent, you will not object to producing it. I accept your statement.

MR. JOYCE: We will produce portions that relate to what you are inquiring about. We will not produce the entire diary.

MR. PASKOFF: As long as you produce that part of the diary which is permissible under Rule 26. You know what the scope of discovery is under Rule 26.

BY MR. PASKOFF:

Q How many conversations did you have with Mr. Edgar?

A I believe two.

Q How long did those conversations last? Let's take the first conversation, if we may.

A Maybe about five minutes, the first one.

Q Did you make Mr. Edgar aware that you were requesting cover for approximately 32 million pounds?

A 32 million pounds of what?

Q That was the value of the forward sales.

A That wasn't the value of the forward sales at all. You have got your numbers cockeyed.

Q To your recollection what was the number of the forward sales?

A At what time?

Q At the time that you had your initial conversation with Mr. Edgar.

A I don't recall. I would have to go back.

Q Approximately?

A This is June 20th. I would have to go back to a Wall Street Journal or a financial time for the value. If I am not mistaken, it was well over 70 million.

Q $70 million, U.S. Dollars?

A On the 20th.

Q Was Mr. Edgar made aware of that?

A Oh, he knew the whole thing.

Q And, this was all told to him within the five minutes, five minute conversation, and did he agree during that five minute telephone call to provide cover for those forward positions?

A He stated that he would take on the sale and the cover providing Wolff would agree.

Q What was the interest or commission of Sharps-Pixley for taking on that obligation?

A That was to be subject to negotiation.

Q Between you and Mr. Edgar?

A Right.

. . .

A No.

Q Did they tell you that they would not provide you with a financing?

A They did.

Q Did they tell you that in writing?

A No.

Q In Answer to Interrogatory No. 16, there is a reference to something known as "merchant banks for refinancing," are you using that term as a proper noun?

MR. JOYCE: No.

THE WITNESS: No, not as a proper noun, as a generic term.

BY MR. PASKOFF:

Q Can you describe the components of that generic term?

A I have to get a telephone directory.

Q Rather than guessing, I am really trying to find out who or what banks you spoke with and when relative to satisfying the spot purchases?

A Schroeder Bank.

Q Who did you speak with at that institution?

A I can't recall his name.

Q Do you recall approximately when you communicated?

A In March.

Q Of 1975?

A Correct.

Q Where is that bank located?

A London.

Q Did they offer to provide you with a financing that you requested?

A They turned it down completely.

Q What other bank or banks did you communicate with?

A Barclay's.

Q In London, England?

A Correct.

Q Do you recall the person with whom you spoke?

A Chuck Love.

Q Had you done business with him before?

A No. We have mutual acquaintances.

Q Did Barclay's offer to satisfy the financial requirements that you asked for?

MR. JOYCE: Reread that last question.

(Record read as requested.)

THE WITNESS: For what purpose?

BY MR. PASKOFF:

Q For the purpose of satisfying the security

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November 6, 1974

NEIMAN'S FIRST SILVER TRANSACTION

Stotler and Company

STUART NATIONAL BANK BUILDING, STUART, FLA. 33494 · 305-283-2420

SOUTHEAST ERN COUNTRY ELEVATOR HEDGING DIVISION

James Courlay
Rudolf Wolff and Company
Knollys House
11 Byward Street
London, England EC3R5ED

Dear James,

For The London Group-1974, c/o David Nieman, 2150 Lincoln Parkway, West Chica

Illinois, 60614, work out a $150,000 interest deduction and a 7 month long te

seas.

Pay the 2% commission to Stotler and Company.

Sincerely

William E. Casselman

James - Make the total commission 8% not 3%

to Dave

Bill

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Conrad Clarke

R.S. ASSOCIATION

C.B. BROWER — R.J. HANBY HOLMES
P.A.J. BOYCE — B.M. COLEMAN
T.J. JOHNSON-GILBERT — C.I. McGONIGAL
J.H. SMAITH — M.R. MATHEWS
H.S. PIGOTT — P.J. ROOKE
R. FOX BASSETT — J.R.W. RUDDICK
J.J. FABIL — B.M. BAX
T.B. WOODBURN — M.R. DYER
W.J. THOMAS — A.M.D. WILLIS
B.D.S. LOCK — R.G. MARRI
A.S. SLATER — E.S. PATTON
M.J. MOCKRIDGE — J.P. CARVER

ASSOCIATE: F.R. WILSON

CONSULTANT: SIR DESMOND HEAP

NEIMAN'A SOLICITORS
TO WOLFF'S
SOLICITORS

Royex House
Aldermanbury Square
London EC2V 7LD
TELEPHONE 01-600 5688
TELEGRAMS & CABLES
COCHANOOY LONDON EC2
TELEX 8812884

EEC OFFICE
AVENUE DES ARTS 21-22
1040 BRUSSELS BELGIUM
TELEPHONE BRUSSELS 230 50 70/80 TELEX 20431

IN REPLY PLEASE QUOTE

REFERENCE Q/AM PLR.366/PJO 20th May 1975.

~~BY HAND~~

21 MAY 1975

For the attention of Mr. C. L. Simon

Dear Sirs,

London Group 1974

Thank you for your letter of 15th May.

Because your delay in responding positively to the suggestions made in our letter of 7th May for the delivery of certain of our clients' silver purchases is, we are advised, causing our clients significant damage we are instructed to inform you of the following:

(i) Our clients demand immediate delivery of the whole of their long silver positions, totalling 16,601,000 ounces.

(ii) Our clients will procure the immediate discharge of the interest of I. Rochester (Finance) Limited ("Rochester") in these positions by repaying all loans made by that company at the agreed premium of 1 per cent.

(iii) Interest on each loan will be paid to Rochester five days before the original maturity date, pursuant to Rochester's telex of 16th January.

(iv) Full cover of all short positions, totalling 16,601,000 ounces, will be provided to your client.

(v) You will shortly be advised of the time and place at which the necessary funds will be tendered to Rochester and your client.

NEIMAN'S SOLICITORS TO WOLFF'S SOLICITORS

In the event that your client fails to attend or fails to deliver warrants for 16,601,000 ounces of silver upon tender of such funds, we have instructions to commence legal proceedings. We understand that legal and administrative proceedings will also be commenced by our clients in the United States.

Yours faithfully,

Coward Chance

Messrs. Radcliffes & Co.,
10, Little College Street,
Westminster,
London SW1P 3SJ.

NEIMAN'S ANSWERS TO INTERROGATORIES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN d/b/a LONDON GROUP (1974),	)	
Plaintiff,	)	NO. 75 C 2531
v.	)	
RUDOLF WOLFF & CO., LTD.,	)	
Defendant.	)	

PLAINTIFF'S ANSWERS TO DEFENDANT'S INTERROGATORIES

NOW COMES the plaintiff, David Neiman d/b/a LONDON GROUP (1974), by his attorneys, James P. Chapman, Edward T. Joyce and Martha M. Jenkins, and in answer to defendant's Interrogatories, states as follows:

Interrogatory No. 1: State whether, at any time prior to the filing of the complaint in this action, The London Group (1974) (hereinafter "London Group"), was organized or formed as:

(a) a partnership;
(b) a corporation;
(c) an unincorporated association;
(d) a sole proprietorship;
(e) any other business entity; and
(f) the state and statutes under which it was organized.

ANSWER TO INTERROGATORY NO. 1: London Group was not organized as a corporation. The exact legal status of the London Group is not clear. It is either a sole proprietorship or limited partnership. The London Group was organized pursuant to and its conduct is governed by the laws of the State of Illinois.

(d) the substance of each oral communication.

ANSWER TO INTERROGATORY NO. 7: See answer to Interrogatory No. 6.

Interrogatory No. 8: With respect to each written communication referred to in Interrogatory "6," identify each document:

(a) sent by David Neiman to others;
(b) sent by the London Group to others;
(c) received by David Neiman from others; and
(d) received by the London Group from others.

ANSWER TO INTERROGATORY NO. 8: See answer to Interrogatory No. 6.

Interrogatory No. 9: Identify all persons who, on behalf of David Neiman or the London Group, communicated instructions to defendant, either orally or in writing, to purchase the silver bouillon described at Paragraph "3" of the complaint and to sell the silver bouillon as described in defe dants' answer as exhibits "1" - "5" thereto.

ANSWER TO INTERRROGATORY NO. 9: William Kasselman of Stotler & Co.; Coward Chance; and David Neiman.

Interrogatory No. 10: With respect to each oral communication referred to in Interrogatory "9," state:

(a) whether the oral communication for each purchase or sale was telephonic or face to face;
(b) the identity of all persons present during any part of any such oral communication;
(c) the date and place of each oral communication; and
(d) the substance of each such oral communication.

ANSWER TC INTERROGATORY NO. 10: All communications between William Kasselman and the defendant were, to plaintiff's belief, through telex or telephone. Plaintiff does not have copies of said telexes. Further, plaintiff communicated with defendant via telephone, telex and face to face communication. The only face to face communication was between David Neiman, on behalf of London Group, and James Gourlay, on behalf of the defendant. It took place in London, England at the office of James Gourlay at Rudolf Wolff & Co., Ltd. and at Mr. Gourlay's

club. With the exception of one or two clerks who were not parties to the conversation, no one else was present. The meeting took place late in March, 1975. After the meeting, Mr. Neiman instructed Mr. Gourlay that he wished to sell the spot silver and purchase covering contracts for his future silver. Mr. Gourlay, on behalf of Rudolf Wolff & Co., Ltd., refused to follow Mr. Neiman's instructions. Coward Chance contacted defendant and its attorneys both orally and in writing. Copies of said written communications have been delivered to counsel for defendant.

Interrogatory No. 11: With respect to each written communication referred to in Interrogatory "9," identify each document:

(a) sent by or for David Neiman to others;
(b) sent by or for the London Group to others;
(c) received by or for David Neiman from others; and
(d) received by or for the London Group from others.

ANSWER TO INTERROGATORY NO. 11:

(a) through (d) All instructions by David Neiman, in his own name or in the name of London Group, were by telex or through letters from Coward Chance, copies of which have been delivered to counsel for defendant.

Interrogatory No. 12: State the facts and identify the documents which formed the basis of David Neiman's knowledge that the spot silver purchased by the London Group (identified as Exhibits "A" through "F" in the complaint) would be used as security for the financing of the London Group's spot silver purchases from defendant and security for the London Group's contract to deliver silver in the future to defendant (identified as Exhibits "1" through "5" in the answer).

ANSWER TO INTERROGATORY NO. 12: Plaintiff does not now believe and never did believe that the spot silver was security for the financing of the London Group's contract to deliver silver in the future. David Neiman had conversations with Messrs. Kasselman and Gourlay in which they advised him regarding the facts stated in Interrogatory No. 12. Further, Mr. Kasselman gave him written documents containing an example of the transaction. The documents are attached hereto.

Interrogatory No. 13: Identify all persons who communicated with the defendant, either orally or in writing, that David Neiman or the London Group could or would satisfy the security interest or encumberance existing on the spot silver bouillon.

NEIMAN'S ANSWERS TO INTERROGATORIES

ANSWER TO INTERROGATORY NO. 13: David Neiman, 2300 Lincoln Park West, Chicago, Illinois, and Coward Chance, London, England.

Interrogatory No. 14: With respect to each oral communication referred to in Interrogatory "13," state:

(a) whether each oral communication was telephonic or face to face;
(b) the identity of all persons present during any part of each oral communication;
(c) the date and place of each oral communication; and
(d) the substance of each oral communication.

ANSWER TO INTERROGATORY NO. 14: Mr. Neiman had oral communications face to face with Mr. Gourlay during March, 1975. Mr. Neiman explained to Mr. Gourlay that he wanted to sell spot silver and purchase covering contracts for his future obligations. Further discussions were had between Mr. Neiman, his attorneys, Coward Chance, Mr. Gourlay, and Rudolf Wolff & Co.'s attorneys, Radcliffes & Co. The meeting took place at Radcliffes & Co.'s offices. Representatives of I. Rochester Finance, Berwin Leighton, were also present. The conversation was substantially the same as the conversation which Mr. Neiman had with Mr. Gourlay.

Interrogatory No. 15: With respect to each written communication referred to in Interrogatory "13," identify each document:

(a) sent by or for David Neiman to others in any way relating to the satisfaction or release of the security interest or encumberance upon the spot silver;

(b) sent by or for the London Group to others in any way relating to the satisfaction or release of the security interest or encumberance upon the spot silver;

(c) received by or for David Neiman from others in any way relating to the satisfaction or release

of the security interest or encumberance upon the spot silver; and

(d) received by or for the London Group from others in any way relating to the satisfaction or release of the security interest or encumberance upon the spot silver.

ANSWER TO INTERROGATORY NO. 15: Numerous letters and telexes were sent to defendant and its agents by plaintiff and Coward Chance. Likewise, numerous letters and telexes were sent by defendant and its counsel to plaintiff and Coward Chance. Copies of said documents have been delivered to counsel for defendant.

Interrogatory No. 16: Identify all persons with whom David Neiman, or the London Group or others acting on their behalf, communicated, either orally or in writing, for the purpose of arranging the satisfaction or release of the security interest or encumberance upon the spot silver.

ANSWER TO INTERROGATORY NO. 16: Sharps, Pixley, London, England, Harris & Co., and several Merchants Banks for refinancing.

Interrogatory No. 17: With respect to each oral communication referred to in Interrogatory "16," state:

(a) whether each oral communication was telephonic or face to face;
(b) the identity of all persons present during any part of each oral communication;
(c) the date and place of each oral communication; and
(d) the substance of each oral communication.

ANSWER TO INTERROGATORY NO. 17: Communications with Sharps, Pixley were oral. None were face to face. On information and belief, the only persons present were Mr. Neiman and a Mr. Edgar for Sharps, Pixley. Mr. Neiman had one conversation with Sharps, Pixley during March, 1975 in London, England

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DEP. TRANSCRIPT - WILLIAM CASSELMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DAVID NEIMAN, d/b/a LONDON GROUP (1974),	]	
Plaintiff,	]	
v.	]	No. 75 C 2531
RUDOLF WOLFF & CO., et al,	]	
Defendants.	]	

Washington, D. C.

August 31, 1978

Deposition of:

WILLIAM E. CASSELMAN, SR.,

a witness called for examination pursuant to subpoena, by counsel for the Plaintiff, at the offices of William E. Casselman II, Esquire, at 888 - 17th Street, N.W., Suite 204, Washington, D. C., beginning at approximately 10:30 o'clock a.m., before Judith B. Moore, Notary Public, when were present:

. . .

some background questions, but you seem to be going very far afield here from the activities of Gourlay and Inglerman in the Northern District of Illinois, to ask about his office arrangement in London.

So I will make that into an objection.

BY MR. JOYCE:

Q Do you know if the physical suite that Mr. Gourlay was in was the same suite as Rudolf Wolff & Co.?

A They were on the same floor.

Q Were they separated by a wall, do you know?

A Yes, definitely. He had a separate entrance to his offices.

Q Now, did you see Mr. Gourlay in 1974?

A Yes.

Q Did you see him in Chicago in 1974?

A Yes.

Q On how many occasions did you see him in Chicago?

A Probably [illegible].

Q Do you recall the first occasion, when it was?

A It might have been '73 when I first saw him in Chicago, when I was at the ACLI.

And the second time I saw him in the summertime

of '74.

The first meeting, I'm not sure -- I was at ACLI and I moved from ACLI to Stotler in April '74, so it could have been late '73, early '74.

Q What was the purpose of your meeting with Mr. Gourlay during late '73 or early '74?

A He just came in to see me.

Q Why was he in to see you?

A Well, after all, he was my boss at one time and he was an old friend and he came in to see me at ACLI.

Q Where was Gourlay your boss?

A When I was managing director of Rudolf Wolff, in New York. I responded to him on the London side.

Q During 1973, when you met with Mr. Gourlay in Chicago, did he ask you to send any business to Rudolf Wolff & Co.?

A No, he wasn't actively soliciting business because he knew ACLI were clearing members of London themselves.

Q Now, you met Gourlay again in 1974; is that right?

A Right.

. . .

Q Do you know how Neiman knew about Gourlay?

A I think that he probably had heard about Gourlay, probably from myself, but I'm not sure of that.

Q Now, on the occasion of Gourlay's visit in 1974, did he ask you to send any business to Rudolf Wolff & Co., Ltd.?

A No, he didn't because he was not actively soliciting business for Rudolf Wolff & Co., at the time. He was no longer an active partner in the day-to-day business of Rudolf Wolff & Co.

Q Do you know why Neiman and Gourlay met --

A Yes.

Q — in 1974?

Why did they meet?

A To discuss the silver cash and carry.

Q Do you know how Neiman came to know Mr. Gourlay and Rudolf Wolff in relationship to the silver cash and carry?

A As I say, I have to assume it's because I told Dave about it.

MR. VIVIANI: Dave being?

THE WITNESS: Neiman. I'm sorry.

. . .

time and how they divided the spoils up and so forth, and who was employed and who they saw, I never knew.

Whether he was any longer a partner or not, I assumed he was a stockholder, but I didn't know.

Q When you introduced Gourlay to Neiman in '74, did you think that Gourlay would put the trades that were being discussed through Wolff?

A Yes, very definitely, because I wouldn't -- I certainly wouldn't have proposed any business that wasn't put through a reputable house.

Now, he could just as well have put them through Maccatta or any other house, but as long as it's a reputable house.

Q Did you think that Gourlay was meeting Neiman as an agent of Rudolf Wolff?

MR. PASKOFF: I will object to the form of the question. That calls for a legal conclusion. I would ask his counsel to instruct him not to answer it unless you can rephrase the question.

BY MR. JOYCE:

Q During 1974 when you introduced Neiman to Gourlay, did you think that Gourlay was soliciting Neiman's business

on behalf of Wolff?

A I don't think so and I'll tell you why. There had been a rift in the family and Gourlay had more or less gone off on his own in other areas and that -- I knew he was getting ready to do something. Until he showed up in '73 or '74, I didn't know what it was that he was going to do.

Q Well, in '74 why didn't you just direct Neiman to Wolff yourself instead of going through Gourlay?

MR. PASKOFF: I will object to the form of the question. It calls for speculation.

BY MR. JOYCE:

Q Do you want to answer it, sir?

THE WITNESS: Should I answer it?

MR. VIVIANI: I wonder if you can save that question and we can meet that perhaps later in the deposition, if you could just move on. I'm just asking that out of courtesy and we could discuss it at the very end.

If you can make a note of the question so we can have an opportunity to discuss it with Mr. Casselman.

BY MR. JOYCE:

Q Have you ever heard of a company known as Inglerman Investment Company, Ltd.?

. . .

I'n not sure but I don't think he did.

Q Now, after you gave Mr. Neiman information about this tax shelter did he continue to discuss it with you, between the time of your first discussion about the shelter and the time you met with Gourlay?

A Well, as you know, Dave, being as eccentric as he is, had nine jillion questions, all of which I couldn't answer, and rather than me calling London every 15 minutes, I said, "Well, look, Gourlay is going to be over here sometime this summer. Why don't you save them all for him?"

Q What did Neiman say?

A "All right. Fine. We'll have lunch."

Q Now, did Gourlay tell you why he was in Chicago on the occasion of your meeting?

MR. LOW: Objection. Asked and answered.

BY MR. JOYCE:

Q Mr. Casselman?

A No, he didn't come flat out and say, "I'm here to do this or that or so forth." He let me know when he was going to be in Chicago. I told him -- to the best of my knowledge, it's the only client he met of mine there at all. I -- just because I said, "You know, this fellow has questions

. . .

BY MR. JOYCE:

Q Now, calling your attention to the luncheon between Mr. Casselman, yourself, Gourlay and Neiman, do you recall when that luncheon took place?

A It took place after the grain market closed in Chicago, which would place it at about 1:30. It was at Binyon's Restaurant. I don't recall whether it was May, June or July.

Q Could it have been in October, 1974?

A It could have been October, because I didn't move to Florida until late October, early November.

Q Now, the only people present at this luncheon were yourself, Neiman and Gourlay; is that right?

A Correct.

Q Now, during the course of this luncheon, do you recall whether Mr. Gourlay and Mr. Neiman discussed the possibility that a profit could be derived from the transaction depicted in Exhibit No. 1, which profit was not associated with the tax laws?

MR. PASKOFF: I will object to the form of the question, for a number of purposes, Mr. Joyce.

First of all, I think you are putting your own words into a characterization of what Mr. Gourlay may have done

. . .

Q Do you recall if Mr. Neiman asked Mr. Gourlay whether changes could be made in that form agreement?

A That might have been one of the many questions that Dave had asked him but I can't specifically come out and say "Yes, that is one of them," because -- I don't know that but Dave did have an awful lot of questions for him.

Q Do you recall anything Mr. Gourlay told Mr. Neiman at this luncheon?

A No, I really don't because it, you know, it was just along the general lines of the tax shelter and --

Q Did Gourlay explain the tax shelter to Neiman?

MR. PASKOFF: Mr. Joyce, would you permit the witness to finish his answer?

BY MR. JOYCE:

Q Were you finished, Mr. Casselman?

A As I recollect it, Gourlay told Dave exactly what I told him about how it was structured and so forth and Dave did have a lot of questions about it and what they were I don't know, and I don't remember because they were questions that were not going to apply to any of my other clients so they were irrelevant.

I mean he had all kinds of ideas how to do this

and do that which I didn't really pay much attention to, because I felt that they were, a lot of them were frivolous and so forth at the time.

Q Gourlay did explain the tax shelter to him?

A Oh, sure, he outlined it.

Q Now, at any time when you resided in Chicago, Illinois, did you receive any correspondence from James Gourlay on the Rudolf Wolff & Co. letterhead?

A I don't recall getting any, no. If I did, it would be in the files.

Q Did you suggest to Mr. Neiman that he use the tax shelter which is depicted as Exhibit No. 1 here?

A I told him if he was looking for a tax shelter it was the best thing I had seen, yes. After all, I was going to make a handsome commission if he ever did all this business he was talking about.

Q When you say you would have made the commission, would Stotler make the commission or would you make it?

A No, I was more or less moonlighting this situation.

Q Let me show you a document that's been marked as Casselman Exhibit No. 2 for identification, and ask you whether this may refresh your recollection as to whether Stotler was to

. . .

A Stotler was not. It was coming to them but it would all be credited to my account.

Q Well, was it to be credited to your account one hundred percent or only --

A One hundred percent.

Q And did you clear that with someone at Stotler before you made this arrangement?

A Well, I'm certain I talked to somebody, Howard Stotler or one of the partners, and said, "Look, I'm going to do this situation and it's a way for me to make some commission and I will apply it against my deficit."

You must remember that they had no interest in this situation per se as Stotler because they are not certain -- they weren't certain that the Board of Trade of the Chicago Mercantile were in favor of it.

Q Now, at any time while you resided in Chicago, Illinois, did anyone acting on behalf of Rudolf Wolff & Co. ask you to trade through Wolff?

A No, not at all.

Q Anyone ask you to have Stotler trade through Wolff?

A No, not at all.

. . .

A No, I don't.

Q But they would have paid it from Chicago to --

A No. You must remember that Neiman and one other were the only ones in Chicago. The rest of them were all over the country.

Q How many were in the Chicago metropolitan area other than Neiman?

A Offhand, I only recall one other one.

Q Who was that?

A A fellow named Bob Jamison.

Q Now, the people who engaged in this tax shelter did they deal through you in dealing with Gourlay?

A Yes.

Q And they called you in Chicago and you, in turn, contacted Gourlay?

A The majority of this business was all done after I got to Florida. Because, if you know anything about the tax shelter business, everyone wants to do it in December unfortunately. You can explain it until you're blue in the face from January until October and until their accountant tells them what their tax bill is, then they all get panicky and, you know, "What can you do for me?"

. . .

particular contracts.

Q Are these the transactions which you described before, where you visited Rudolf Wolff to act as the executing broker?

A They are.

Q To your knowledge, in any of these transactions depicted in Exhibits 3 through 7, do you recall whether Rudolf Wolff solicited you for the business?

A No, I had no -- actually I had no contact in the sense that all of this was done with Rudolf Wolff in New York and I would get up at 5:00 o'clock every morning and start trading. Talk to their -- only rarely did I ever even talk to management over there, because, you know, the telex operator is the important guy in these trades. As you know, they have an open line between New York and London and speed is of the essence.

MR. PASKOFF: I have no further questions.

MR. JOYCE: I have one or two.

REDIRECT EXAMINATION

BY MR. JOYCE:

Q The two percent commission you were to receive on these tax shelter transactions --

. . .

Q Do you recall who you gave it to at Stotler?

A I would assume I sent it to somebody in accounting.

Q Would it have been Ed Hanson?

A Could have been.

Q Was it sent to Chicago?

A Yes, I'm sure it was. I was already in Florida.

Q The transactions depicted in the bound volumes 3 through 8 were originated in Chicago, Illinios; is that correct, Mr. Casselman?

MR. PASKOFF: I will object to the form of the question.

THE WITNESS: No. The majority of this business was done after I moved to Florida. You will note here that here is May '75 through March, '76. I really concentrated on this business after I got to Florida, on the London business.

BY MR. JOYCE:

Q Well, now, who originated the order, you or the Chicago office?

A I originated the order.

Q And when you were in transactions that occurred before November 1st, '74, would they have been from Chicago?

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN d/b/a LONDON GROUP (1974),	)	
Plaintiff,	)	
vs.	)	NO. 75C 2531
RUDOLPH WOLFE & COMPANY, LTD., JAMES GOURLAY, and INGLERAM INVESTMENTS, LTD.,	)	
Defendants.	)	

The discovery deposition of JOSEPH KLEIN called for examination pursuant to subpoena and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions taken before MARIE A. CRISSIE, a notary public within and for the County of Cook and State of Illinois, at 141 West Jackson Boulevard, Suite 4100, Chicago, Illinois, on the 26th day of September, 1978, at the hour of 3:00 o'clock p.m.

. . .

with Courlay and his company, and you responded in the affirmative by his company; do you mean Rudolph Wolfe & Company, Limited?

A To the best of my knowledge, I dealt with Wolfe, yes.

MR. LOW: No other questions.

EXAMINATION

BY MR. PASKOFF:

Q Mr. Klein, how long have you been in the commodities business?

A I have been in the commodities and securities business for 51 years. You heard me, I am 68.

Q With respect to the transactions reflected in Exhibits 1 through 6, did Rudolph Wolfe & Company, Limited, solicit your business for those transactions?

MR. JOYCE: I would object to the form of the question since it calls for a conclusion as opposed to facts. It is improper for this gentleman to make the conclusion. He can tell you what Rudolph Wolfe & Company did or didn't do, but it is up to the court to decide whether they solicited his business.

MR. PASKOFF: You may answer.

THE WITNESS: No, they did not.

THE WITNESS: I was buying cash silver. I was operating a cash and carry operation. I bought cash silver and I sold the future against it, and I put and sold the put against it. So, my position was even as to market risk, and I was attempting to, over that period, to pay charges against storage, insurance, et cetera, and then hopefully to liquidate in the futures' market, six months later.

MR. PASKOFF: I have no further questions.

EXAMINATION

BY MR. JOYCE:

Q Mr. Klein, in the transactions reflected by Exhibits 1 through 6, did you finance any portion of these transactions through I. Rochester (Finance) Limited?

A Yes, I did.

Q Did Mr. Gourlay arrange that financing?

A It was part of that transaction.

Q It was arranged by Mr. Gourlay, was it not?

A The answer is yes, or Wolfe or London.

Q You say you sought out Rudolph Wolfe & Company, Limited, as executing broker on these transactions?

A Yes.

DEP. TRANSCRIPT - MARSHALL PERSKY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN d/b/a LONDON GROUP (1974),	)	
Plaintiff,	)	
vs.	)	NO. 75 C 2531
RUDOLPH WOLFE & COMPANY, LTD., JAMES GOURLAY, and INGLERAM INVESTMENTS, LTD.,	)	
Defendants.	)	

The discovery deposition of MARSHALL PERSKY, called for examination pursuant to the Rules of Civil Procedure for the United States District Court pertaining to the taking of depositions, taken before MARIE A. CRISSIE, a notary public within and for the County of Cook and State of Illinois, at Suite 4100, 141 West Jackson Boulevard, Chicago, Illinois, on the 26th day of September, 1978, at the hour of 4:00 o'clock p.m.

Casselman?

A Yes.

Q How did you go about initiating that transaction?

A Either I asked Mr. Casselman to initiate it on my behalf because of his familiarity with it, or I called and spoke with Mr. Gourlay or one of his assistants about it.

Q Did Mr. Gourlay initiate any conversation with you about cash and carry transactions?

A He initiated no conversation whatsoever.

Q Whenever you called Mr. Gourlay, where did you call him at, where was he when you called him?

A London.

Q Did you ever call him in Chicago, Illinois?

A No, sir.

MR. MONTANA: Do you mean where the witness was when he made the call?

MR. LOW: Where Mr. Gourlay was?

MR. MONTANA: The witness was in Chicago.

MR. LOW: But Mr. Gourlay was never in Chicago when you initiated the call conversation?

MR. JOYCE: When he initiated the call.

THE WITNESS: No.

DEP. TRANSCRIPT - RONALD RICHTER

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

DAVID NEIMAN, D/B/A/ LONDON GROUP (1974)	I	
VS.	I	CA 75 C 2531
RUDOLPH WOLFF & CO., LTD, ET AL	I	

- - -

APPEARANCES:

EDWARD T. JOYCE, Chicago, Illinois,

For the Plaintiff;

REUBEN & PROCTOR, Chicago, Illinois,
By Mr. Theodore Low,

For the Defendants.

- - -

ANSWERS AND DEPOSITION OF RONALD H. RICHTER, produced as a witness at the instance of the Plaintiff, taken in the above styled and numbered cause on the 4th day of August, A. D., 1978, at 2:00 o'clock P. M., before R. T. Harris, a Notary Public in and for the State of Texas, County of Dallas, at the offices of Hughes, Luce, Hennessy, Smith & Castle, 1000 Mercantile Dallas Building, in the City of Dallas, County of Dallas, State of Texas, in accordance with the Notice hereto annexed and the Agreement hereinafter set forth.

Q And where did you meet him?

A At Lake Point Tower, 505 North Lake Shore Drive, 68th floor, in my offices.

Q Okay. Was anyone else present when you met Mr. Gourlay?

A My initial meeting, I think office personnel, but that's all.

Q Was anybody in attendance at the meeting other than being present, were they participating in the meeting?

A No, I was the only one.

Q Okay. What was the purpose of the meeting with Mr. Gourlay in October of 1974 in Chicago, Illinois?

A To conclude arrangements we had previously made in the last, in the two prior months, for Rudolph Wolff & Company to handle some cash and carry transactions for us.

Q And in what commodity were these cash and carry transactions?

A Silver.

Q How was it that Mr. Gourlay visited you in Chicago?

A I was aware of Rudolph Wolff being engaged from perhaps ten or fifteen years previous, in some

transactions I had with Rudolph Wolff, in cash and carry transactions on the London Exchange, and I was aware that they were the largest in London, and I telephoned Rudolph Wolff approximately two months prior to the time I met with Mr. Gourlay and asked who was in charge of these similar transactions, and was referred to Mr. Gourlay. And Mr. Gourlay and I had discussions about the kind of transactions we wanted to engage in, and he indicated that he would be in Chicago approximately October, and suggested we get together.

Q And did you, in fact, get together?

A Yes.

Q And did Gourlay negotiate these transactions, these cash and carry transactions with you in Chicago?

A He did.

Q And did he arrange for the financing of these transactions?

A Yes.

Q Who financed the transactions?

A He indicated that the transactions would be financed through affiliates of Rudolph Wolff, and later I found out that the name of at least one of them was I. Rochester.

Q The actual terms of your agreements with Rudolph Wolff & Co., Limited with respect to the forty-nine million dollars worth of cash and carry transactions, and hundreds of millions of dollars worth of option transactions, were agreed to in Chicago, Illinois, at the two meetings that you had with Mr. Gourlay, is that correct?

A The terms had been negotiated on the telephone prior to our meeting, and I was aware of the terms prior to our meeting. The terms were finally agreed to at those meetings.

Q Okay. Final acceptance was at those meetings?

A That is correct.

MR. JOYCE: No further questions.

MR. LOW: One more question.

RECROSS EXAMINATION

BY MR. LOW:

Q As I recall your testimony, that those terms were not changed at the Chicago, Illinois meetings from the ones discussed over the telephone, is that correct?

A The terms were not, not changed, but the original terms, for at least the options, were discussed in '74 and '75 in those meetings.

Q But the cash and carry transactions, the terms were exactly as discussed over the telephone?

A Yes, except clarified, perhaps.

Q Okay.

MR. LOW: Okay?

MR. JOYCE: Okay, thank you very much.

(Signature of witness waived by agreement of all parties.)

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RULES OF THE
LONDON SILVER MARKET

GENERAL

1. The following are the conditions under which business in silver is normally transacted in the London Silver Market.

2. By giving an order to or accepting a contract from a London Broker the client accepts the terms of these conditions.

3. The Broker does not pass names or act or contract as Agent. His contracts are Principals' Contracts, but he charges brokerage on all silver purchased from him at fixing.

4. A Broker is at liberty to accept or refuse any order and is under no obligation to execute orders received by him.

QUOTATIONS

5. The official prices are fixed once daily (Monday to Friday) there are four prices, one for cash or "spot" delivery—and three for forward delivery, maturing three, six and twelve calendar months from the date of the contract, Saturday contracts falling due on the previous Friday and Sunday contracts on the following Monday.

6. Spot contracts are for delivery on, or within seven days of, the contract date at the option of the seller; forward contracts are for delivery on the specified dates. Instructions must be given not later than the business day prior to maturity date regarding the liquidation or extension of such contracts.

7. Prices are quoted in pence per troy ounce .999 fine and the ounce .999 fine is the unit of accountancy in the London Market.

8. The London Brokers meet for fixing at 12.15 p.m. Orders for execution at the fixing should therefore be received before this time; dealings at other times are subject to negotiation.

9. The normal basis on which prices are fixed is that all effective offerings for sale must be absorbed, so that selling orders received in time are executed at the fixed prices. It may happen on occasions that offerings at the fixed prices are insufficient to satisfy buyers, whereas higher prices would have produced a preponderance of selling, thus making it impracticable to fix at the higher level, or there may be an excess of buying over selling orders at the fixed prices; in such circumstances the Broker may not always be able to execute buying orders in full at the fixed prices.

10. If buyers send orders for silver which is required before the expiration of seven days, they may, if there is a scarcity of ready silver, be unsuccessful in securing it, except at a premium over the official spot quotation.

CONTRACTS

11. The term "contract" does not imply any particular quantity.

RULES OF THE LONDON SILVER MARKET

BROKERAGE

12. The Brokerage charged on all silver purchases made at the fixing is ¼ per cent.; the minimum brokerage is £10.

13. Sales are effected free of brokerage.

DELIVERY

14. All contracts are for delivery at the office of a Broker; any charges incurred for collection, shipment, cartage, warehousing, etc., will be payable by the client.

15. Deliveries of silver bars in fulfilment of contracts must be made in commercial bars assaying 999/1000 which is the only quality recognised; fractions of milliemes are ignored.

16. Silver of qualities lower than 999/1000 can of course be sold in the London Market, but is subject to charges incurred in refining it up to the required level to make it of good delivery. It is of course not available for the fulfilment of a contract until the refining has been completed.

Commercial silver bars vary in weight, but approved bars weighing up to about 1,250 ounces troy are acceptable.

17. As a seller is entitled to deliver any bars recognised as good delivery, the Broker is naturally unable to guarantee to make delivery in bars of a particular brand; the Broker will, however, do his best to meet the wishes of the client in this respect.

EXTENSIONS OF CONTRACTS

18. If it is desired to prolong a contract for a further period instead of making or taking delivery, the prolongation can normally be effected by the re-sale (or re-purchase) of the contract and the purchase (or sale) of forward on the same terms as those governing ordinary purchases or sales.

Instructions regarding the liquidation of a contract falling due should in any case be received at the latest in time for fixing on the business day prior to maturity, in the absence of which the Broker reserves the right to extend or close the contract.

MARGIN

19. Margin required on forward contracts is by arrangement.

20. Differences on closed contracts are only payable on the due date; prior to this, however, any such difference in a client's favour may be considered as margin on fresh operations.

STORAGE OF SILVER

21. Storage of silver can be arranged on the following terms :–

(a) Actual bars can be allocated and a weight list rendered, in which case the storage is charged at a rate to be agreed.

(b) The silver can be held by the Broker without allocating any special bars; in this case storage is charged at 2/6 per 1,000 ounces per month or part thereof.

(c) Insurance on silver is normally covered by the Broker and the cost of such insurance is included in the storage charge.

POWER TO SUSPEND

22. The London Brokers reserve to themselves the right to suspend or vary these conditions, or any of them with or without notice, if in their opinion they consider that circumstances have rendered such a course desirable

LONDON, 1st MAY, 1969.

All conditions previous to this date are hereby cancelled.

A110
HOLFORD AFFIDAVIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN d/b/a
LONDON GROUP (1974),

Plaintiff,

-against-

RUDOLF WOLFF AND CO. LTD.,

Defendant.

Civil Action No. 75 C 2531

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANCIS HOLFORD, being duly sworn, deposes and says:

1. I am a resident and citizen of the United Kingdom and Secretary of defendant Rudolf Wolff and Co. Ltd. ("Wolff"), a United Kingdom corporation located in London, England. As such, I have personal knowledge of the matters contained in this affidavit, except where otherwise expressly stated.

2. I make this affidavit in support of defendant's motion to dismiss the complaint on the grounds of: (1) lack of personal jurisdiction over Wolff, which has not transacted

any business in the State of Illinois and does not have sufficient minimum contacts with that state to permit this Court to exercise personal jurisdiction over it; and (2) the insufficiency of the purported service of process upon Wolff by delivery of a summons and complaint to Rudolf Wolff & Company, a New York partnership which is not a branch office of Wolff.

3. Wolff is a corporation organized and existing pursuant to the laws of the United Kingdom. Its principal place of business is in London, England. Wolff is engaged as principal and broker in the business of trading metals on various London and other exchanges.

Wolff does not advertise or otherwise solicit customers in the State of Illinois or the United States.

Wolff does not maintain any office or registered agent in the State of Illinois or the United States.

Wolff has no assets in the State of Illinois.

Wolff has never paid or been assessed any taxes in the State of Illinois.

Wolff has never been party to any action or proceeding in the State or Federal Courts in the State of Illinois.

4. (a) Rudolf Wolff & Company (the "N.Y. Partnership") is a general partnership organized pursuant to the laws of the State of New York, whose only place of business is in New York City. Wolff has no direct ownership or other interest in the N.Y. Partnership; however, a Delaware corporate subsidiary of Wolff holds a twenty percent (20%) interest in that firm. The N.Y. Partnership is not authorized to accept service of process for Wolff or otherwise act as agent for Wolff.

(b) The N.Y. Partnership trades as principal and acts as broker in metals in the United States. In some cases the N.Y. Partnership refers United States citizens who wish to trade in London metals to Wolff and, in such cases, it receives a commission from Wolff. Wolff currently has approximately twelve regular United States customers who were referred to Wolff by the N.Y. Partnership. The N.Y.

Partnership had no role or interest in the London silver trading which is the subject of this action.

5. Plaintiff is known to Wolff as a principal in, or agent of, an Illinois limited partnership known as the London Group (1974) (the "London Group"). Plaintiff and the London Group were introduced to Wolff by one William E. Casselman ("Casselman"), of Stotler & Company ("Stotler"), through James Gourlay ("Gourlay"), of Ingleram Investments Ltd. ("Ingleram"). During the period from November of 1974 to March of 1975, David Neiman ("Neiman") and/or the London Group entered into a series of seven so-called "cash and carry" straddle transactions in silver on the London bullion market. That is, in each case they purchased a quantity of silver from Wolff for immediate delivery and sold the exact quantity back to Wolff for delivery at a future date to Wolff. The actual or spot purchase was financed in full by a Swiss financier in a non-recourse loan secured by the silver purchased, payable on the date of the forward sale, and to be paid with the proceeds of the forward sale of that silver to Wolff. Wolff's only role in such a transaction is as seller of silver in London on the spot purchase and purchaser of silver in London on the forward sale.

6. No one from Wolff ever went to Chicago to meet with Neiman or the London Group. All transactions were conducted in London and were paid for in London by the third-party financier. The only contacts that Wolff has had with the United States, the State of Illinois, or the City of Chicago in regard to the transactions in suit have been the sending of sale confirmations to the London Group in Chicago and the sending and receipt of telex messages to and from Chicago in connection with the London Group's silver trades.

7. All of the purchase and sale contracts which are the subject of this lawsuit were and were to be performed in London, England. No activity was contemplated or required by any party in the State of Illinois or, indeed, the United States. Copies of the purchase and sale confirmations are annexed hereto as composite Exhibit A.

8. Ingleram is engaged in the business of advising its clients on metals trading. Ingleram and Gourlay recommend Wolff to their clients who wish to execute trades in the London metals markets, and on such occasions Ingleram is paid a commission by Wolff. Gourley is a shareholder and officer of Ingleram. Wolff has no interest in Ingleram and

Ingleram has no interest in Wolff. Neither Gourlay nor Ingleram have any general authority to speak for or bind Wolff. However, in April of 1975 when Neiman began negotiations in London with respect to the London Group's trading accounts, Gourlay, as the person responsible for introducing this customer, was asked by Wolff to negotiate the position. At that time, Neiman sought to obtain delivery of the spot silver actually purchased by the London Group. Through its solicitors in London, Wolff indicated that, subject to his ability to come to terms with the financier for the release of the silver, Wolff would have no objection to his taking delivery thereof and would deliver the silver subject to the posting of sufficient margin to cover his (or the London Group's) obligation for future delivery of a like amount of silver to Wolff. He was apparently unwilling or unable to do so, for he never did.

9. I understand that Casselman is an employee of Stotler who was approached in Chicago by Neiman with a view toward London silver trading. Casselman introduced Neiman to Gourlay. Thereafter, Casselman, from Florida, placed the first order for the London Group. Subsequent orders were placed by Neiman directly. Casselman was to receive a commission on Neiman's trades. Neither Casselman nor Stotler have any relationship with Wolff.

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HOLFORD AFFIDAVIT

10. Neither Neiman nor the London Group have as yet paid any commissions or fees to anyone on account of their considerable trading action.

Francis Holford

FRANCIS HOLFORD

Sworn to before me this
16th day of October, 1975.

Gloria S. Jannello

GLORIA S. JANNELLO
Notary Public, State of New York
Qual. in Queens Co. No. 24-4654815
Certificate filed in New York County
Commission Expires March 30, 1977

A117
GOURLAY AFFIDAVIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

DAVID NEIMAN d/b/a
LONDON GROUP (1974)

Plaintiff,

-against-

RUDOLF WOLFF AND CO. LTD.,

Defendant.

Civil Action No. 75 C 2531

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES GOURLAY, being duly sworn, deposes and says:

1. I am a citizen of the United Kingdom, resident in London, England, and the managing director of Ingleram Investments Ltd. ("Ingleram"), a corporation organized and existing in the United Kingdom. I make this affidavit in support of the motion of defendant Rudolf Wolff & Co. Ltd. ("Wolff") to dismiss this action for lack of personal jurisdiction and insufficient service of process; and, I have personal knowledge of the matters contained in this affidavit.

2. I am not an officer, employee, agent, or director of Wolff. I am not a partner, agent, or employee of the New York partnership, Rudolf Wolff & Company (the "N. Y. Partnership"), to which process was delivered in this case.

3. I am employed exclusively by Ingleram, which counsels various clients with respect to metals trading. When a client's financial planning calls for the purchase or sale of spot or future metals in the London markets, I recommend that such trading be done with or through Wolff; in return, Wolff pays Ingleram a commission on completed trades for customers it introduced. Wolff exercises no dominion or control over the activities of Ingleram or me, except for its right to decline to accept a customer we introduce. Apart from commissions, Wolff makes no payments, whether of fees, expenses or otherwise, to Ingleram or me. Neither I nor Ingleram receive any payments from the N. Y. Partnership.

4. Neither I nor Ingleram solicit clientele, and neither deal with people who are not known to me or introduced and recommended by people who are known to me.

5. On October 14, 1974, I visited William E. Casselman ("Casselman"), an employee of Stotler and Company ("Stotler"), a firm of commodity brokers which has an office in Chicago, Illinois. At luncheon that day, I was introduced by Casselman to David Neiman ("Neiman"), a customer of Casselman's. During the course of this luncheon we discussed, among other things, the "cash and carry" transaction in silver. A "cash and carry" transaction is a straddle in which one purchases a quantity of silver for immediate delivery; the purchase price is wholly financed by a third party financier in a non-recourse loan secured by the purchased silver and repaid with the proceeds of the sale of that silver on the due date of the loan; and, the buyer at the time of the purchase immediately sells the silver for delivery on the loan's due date. I explained this transaction and pointed out to Neiman that its attractiveness would depend on his individual financial and tax circumstances, and suggested that the situation could only be evaluated by him and his tax and financial advisors. No proposals were made by either myself, Neiman or Casselman at the October 14, 1974 luncheon meeting. I did not see Neiman again until April of 1975, in London. Wolff did not send me to the United States or Chicago on that or any other occasion. Wolff paid no portion of my expenses. Wolff was not informed of my trip.

6. In early November 1974, Casselman placed the first orders on behalf of the London Group (1974) (the "London Group") which I was told was, or was to be, an Illinois limited partnership sponsored by Neiman. Casselman and Neiman were to receive commissions on the transactions entered into by the London Group. Neiman later directed that his 3% commission be omitted, as he was to be compensated by the London Group.

7. Thereafter, at Neiman's request, I arranged for the financing of the purchases on the non-recourse secured loans described above and arranged for the placement of the necessary purchase and sale transactions with Wolff. Between November of 1974 and March of 1975, the London Group concluded seven straddle transactions for the immediate purchase and sale for future delivery of some 16,601,000 ounces of silver. In each case, the purchase was financed on the secured, non-recourse basis described above. A copy of the financier's agreement is annexed as Exhibit A. Each transaction was financed on the terms recited in Exhibit A. In each case substantial commissions, and management and storage fees were incurred. All of these transactions were entirely undertaken and performed in London. None of the various contractual obligations of the respective parties were to be performed in the United States.

8. On or about April 9, 1975, Neiman requested delivery in London of the silver actually purchased by the London Group. As the party introducing Neiman and the London Group to Wolff, I was asked to handle this aspect of customer relations for Wolff and was instructed by Wolff to advise Neiman that the silver would be delivered if Neiman could obtain the release of the security interest of the financier in the spot silver and put up adequate margin for the London Group's future delivery obligations. Neiman and his London solicitors were so advised. The negotiations all took place in London and involved the various means by which the security interest might be discharged and the necessary margin posted in London. In the end, however, neither Neiman nor the London Group satisfied the security interest and neither posted the required margin. Therefore, the silver was not delivered to him and the first five loan agreements and forward sale contracts were closed out as scheduled. Neither Neiman nor the London Group have paid any of the fees or commissions incurred.

JAMES GOURLAY

Sworn to before me this
17th day of October, 1975.

Victoria Panos

VICTORIA PANOS
Notary Public, State of New York
No. 41-[illegible]5410 Qual. in Queens Co.
Cert. Filed in New York County

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID NEIMAN d/b/a LONDON GROUP (1974),	)	
Plaintiff,	)	
v.	)	No. 75 C 2531
RUDOLF WOLFF & CO., LTD.,	)	
Defendant.	)	

AFFIDAVIT OF MOSHE SHALTEIL
IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS

I, MOSHE SHALTEIL, being duly sworn, deposes and says:

1. That I am employed as a registered representative at Blyth, Eastman, Dillion & Company at 135 South LaSalle Street, Chicago, Illinois.

2. That neither I nor my employer is a party to the pending litigation, and I

submit this affidavit upon personal knowledge setting forth the facts.

3. That I am advised that counsel for Plaintiff has filed with the Court a letter addressed to me from James Gourlay dated February 2, 1976, a copy of which is attached hereto, marked Exhibit A and by references incorporated herein, to establish that the Defendant Rudolf Wolff & Co., Ltd. does business in the United States.

4. In fact, the subject letter refers to London bullion transactions which I placed in 1975 with Rudolf Wolff & Co., Ltd. while I was in London, England. At no time did James Gourlay or any officer, agent or employee of Rudolf Wolff & Co., Ltd. ever visit me in Illinois or transact any business with me in Illinois.

5. Moreover, at no time did James Gourlay or Rudolf Wolff & Co., Ltd. ever solicit any business from me. On the contrary, I initiated the transactions and placed the business with Rudolf Wolff & Co., Ltd. in London since they are a respected London commodities firm with expertise in the type of transctions which were of interest to me.

6. It has been my experience that U.S. citizens seek out Rudolf Wolff & Co., Ltd. because of its particular capability in executing transactions in the London bullion market.

/s/ Moshe Shalteil

SUBSCRIBED AND SWORN to
before me this 25th day
of August, 1976.

/s/ Bobbie Felcoff
Notary Public

80-248

Supreme Court, U. S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1980

RUDOLF WOLFF & CO., LTD.,

Petitioner,

vs.

DAVID NEIMAN, d/b/a THE LONDON GROUP (1974),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. HARTE
111 West Washington Street
Chicago, IL 60602
Tel. No. (312) 726-5015

JAMES P. CHAPMAN
33 North Dearborn Street
Chicago, IL 60602
Tel. No. (312) 263-0789

Of Counsel:
EDWARD T. JOYCE

The Scheffer Press, Inc.—(312) 263-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-248

RUDOLF WOLFF & CO., LTD.,

Petitioner,

vs.

DAVID NEIMAN, d/b/a THE LONDON GROUP (1974),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED

1. Where the evidence shows that an alien company designedly conducted business worth hundreds of millions of dollars by directly soliciting the business through its agents within Illinois, was the Seventh Circuit in error in determining that the alien company submitted itself to the jurisdiction of Illinois courts with respect to the transactions?

2. Is there a sufficient evidentiary basis to the Seventh Circuit's determination that the negotiations in a luncheon meeting between the alien company's agent and plaintiff, together with all the other factual circumstances, estab-

lished a sufficient jurisdictional foundation to overcome the constitutional objection raised by the alien company.

JURISDICTIONAL STATEMENT

The petitioner has accurately stated this Court's jurisdiction, the opinions below and the constitutional and statutory provision involved (Pet., pp. 1-2).

STATEMENT OF THE CASE

Nature of the Case and The Proceedings Below

The original complaint in this case was filed on July 20, 1975. The complaint named Rudolf Wloff & Co., Ltd. ("Wolff") as defendant and sought to specifically enforce agreements to purchase and deliver silver on the London Silver Market, and to obtain damages for breach of the agreements. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §1392. Jurisdiction over the person of the defendant was asserted pursuant to the Illinois Long Arm Statute, Ill. Rev. Stat., ch. 110, §17 (1977).

After the initial complaint was filed, Wolff moved to dismiss the complaint for lack of personal jurisdiction. Affidavits were filed by both parties. The district court, Judge Alfred C. Kirkland presiding, ruled that because the affidavits filed by both parties contained conflicting statements, the court was required to assume as true the facts related in the plaintiff's affidavit and complaint. Upon careful consideration, the court concluded that Neiman had successfully met the burden of showing *prima facie* that personal jurisdiction existed.

Plaintiff subsequently amended the initial complaint, adding James Gourlay ("Gourlay") and Ingleram Investments, Ltd. ("Ingleram") as defendants. The amended

complaint also delineated the grounds for asserting personal jurisdiction over the defendants, describing some of the material acts giving rise to the claims for relief which took place in the Northern District of Illinois, Eastern Division.

The amended complaint contained four claims for relief. The first claim alleged that Wolff was liable for breach of contract. The second claim alleged that Gourlay and Ingleram were liable for breach of warranty of authority or, alternatively, for breach of contract. The third claim for relief was against Wolff and Gourlay and was based on the doctrine of apparent authority or estoppel, alleging that the defendants were estopped to deny that Gourlay was a principal or agent of Wolff. The fourth claim for relief was for common law fraud, alleging that the defendants willfully, maliciously, and in bad faith conspired to deprive the plaintiff of the benefits of his contract with Wolff. (First Amended Complaint; App. 1-11).*

Wolff moved, pursuant to Rule 12(b)(2), Fed. R. Civ. Proc., to dismiss the amended complaint for lack of personal jurisdiction. (App. 14-16). The motion was supported by affidavits of Elliot Paskoff, Wolff's attorney, Francis Holford, Wolff's Secretary, defendant James Gourlay, and various documents and papers attesting essentially to the non-Illinois characteristics of the defendants and the instant transactions. (Appendix to Wolff Memorandum in support of its Motion to Dismiss with

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* References to "App." are to the Appendix filed in the Seventh Circuit. References to "Pet. App." are to the Appendix included with the Petition. References to "Resp. App." are to the Appendix in Respondent's Brief in this Court.

Affidavits; Supplement to Record on Appeal.) This motion was granted on March 16, 1978. In its Memorandum Opinion and Order, the district court held that Wolff did not have sufficient contacts with Illinois to establish personal jurisdiction. (Pet. App. A14-22)

Plaintiff then filed a motion for reconsideration of the order dismissing the cause as to Wolff. This motion was denied, with the district court adhering to its original opinion. Plaintiff initiated additional discovery. On the basis of newly discovered testimony, plaintiff filed a second motion for reconsideration. This motion was also denied by Memorandum Order (Pet. App. A23-25).

Wolff moved for a final judgment upon an express determination that there was no just reason for delay and upon an express direction for the entry of judgment. This motion was granted on April 30, 1979. Plaintiff filed a notice of appeal from this final judgment as to Wolff on May 25, 1979.

On June 27, 1979, the district court entered an order dismissing the cause as to defendants Gourlay and Ingleram for lack of personal jurisdiction. Plaintiff filed a notice of appeal from this order and judgment on July 12, 1979. The two appeals were thereafter consolidated.

The Seventh Circuit Court of Appeals, by unanimous decision delivered by Honorable Philip Tone prior to his retirement and appearing in the Petition, pp. A1-13, reversed the district court's determination as to personal jurisdiction over Wolff and Gourlay. A petition for rehearing *en banc* was denied. Wolff alone seeks certiorari here. Its petition to stay the issuance of the mandate was denied with the comment by the Court that "this case does not appear to us to be worthy of further review by certiorari." (Resp. App. 1a).

STATEMENT OF FACTS

Petitioner's account of the underlying facts in this case suffers from a selectivity which does not appropriately consider that any conflicts must be resolved in favor of the plaintiff on this jurisdictional motion. The effort to underplay the significance and extent of Wolff's contacts in Illinois cannot be sustained in light of the deposition testimony of Messrs. Persky, Lipschultz, Klein, Casselman, Richter, Neiman and others concerning the full extent of their dealings with Wolff and Gourlay, the tailor-made multi-million dollar agreement which was negotiated by Gourlay and Neiman in Chicago, the relationship of Gourlay, Wolff, Casselman and others in developing customer relations and transacting business, and the economical and commercial realities of the case.

The plaintiff, David Neiman ("Neiman"), d/b/a London Group (1974), is a citizen and resident of the United States, the State of Illinois and the City of Chicago. Wolff is a corporation incorporated under the laws of the United Kingdom. Wolff is a resident of London, England and of the State of New York. Wolff acts as a broker and principal in London metal transactions, including the purchase and sale of fine silver on the London Silver Market. Ingleram is a corporation incorporated under the law of the United Kingdom and is a resident of London, England. Ingleram acts as a consultant to investors interested in metal trading. Gourlay is a citizen of the United Kingdom and a resident of London, England. Gourlay is a former employee of Wolff, and is presently an employee of Ingleram. (First Amended Complaint, p. 2; App. 2) Gourlay is currently affiliated with

Wolff as a "one-half commission man." (Response of James Gourlay to Interrogatory 1 of Plaintiff's Second Set of Interrogatories; App. 22) Gourlay with the knowledge and authorization of Wolff, represented Wolff in the transactions which are the subject of this litigation. (App. 22).

In the summer of 1974, Neiman became interested in the use of silver trading as a tax shelter. In August or September of 1974, Neiman discussed silver trading with William E. Casselman, Sr., a broker with Stotler and Company of Chicago, Illinois. Casselman was previously employed (1969-1971) by Wolff in New York City. (Casselman dep., p. 9). While employed by Wolff/New York, Casselman worked closely with Wolff/London, and described Gourlay, who was at that time employed by Wolff/London, as his boss and old friend. (Casselman dep., p. 13.) In late 1973 or early 1974, Gourlay came to Chicago and made Casselman and two or three other brokers aware of the existence of cash and carry silver transactions as tax shelters. In the words of Casselman, Gourlay "obviously wanted somebody out hustling it. . . ." (Casselman dep., p. 36.) During 1974, Casselman handled in Illinois approximately twenty-five of these cash and carry deals, all through Wolff, all with the assistance of Gourlay. (*Id.*, p. 33)

Depositions of other brokers establish that these solicitations by Gourlay on behalf of Wolff began in 1969 and continued through 1975. (Persky, Lipschultz, Klein, Casselman and Richter depositions.) Gourlay, for and on behalf of Wolff and through the offices of Wolff, solicited, negotiated and ultimately effected agreements in Chicago, with Illinois residents, for the purchase and sale of silver and other commodities on the London market. *These*

transactions involved hundreds of millions of dollars. (Richter dep., p. 16).

In his discussions with Neiman, Casselman explained generally how silver trading worked (as explained to *him* by Gourlay), and said that the trading would be arranged through Wolff. Casselman arranged a luncheon meeting with Gourlay where the tax shelter aspects of the transactions could be discussed in detail, Neiman's questions would be answered, and a final agreement effected.

The luncheon meeting took place on October 14, 1974, at Binyon's Restaurant in Chicago, Illinois. The meeting was attended by Casselman, Gourlay and Neiman. At the meeting, and at all times thereafter, Gourlay was represented to Neiman as a senior management official of Wolff. The meeting lasted two to three hours, and Gourlay explained in detail the mechanics of the cash and carry transaction and its use as a tax shelter. Neiman asked numerous questions, and eventually Neiman and Gourlay agreed upon the terms of the trades which were made with Wolff. (Neiman dep., pp. 123-134).

The trades agreed to are known in the commodities markets as cash and carry trades. Neiman would place an order for the purchase of a specified amount of silver bullion for immediate delivery ("spot purchase"). At the time of the spot purchase, Wolff was to arrange for the sale of an equal amount of silver for future delivery approximately seven months later ("forward sale"), anticipating that the forward sale would qualify as a long-term capital gain to Neiman. The forward sale would be made at a slightly higher price than the spot purchase in order to cover carrying costs.

Neiman and Gourlay also agreed that the transactions were to be financed 100% by I. Rochester Finance, Ltd.

("Rochester"), a United Kingdom corporation which finances transactions in silver for Wolff's customers through a commercial bank in the United States. Rochester was to pay the purchase price of the silver directly to Wolff, the loan secured by the silver and due upon completion of the forward sale. *Neiman was thus responsible only for the interest charges on the loans.* These interest charges were in turn financed by a loan from the United States commercial bank to Neiman. Under the loan agreement, Neiman could pre-pay the Rochester loans on payment of a penalty. The price of the forward sale was calculated to offset the interest charges to Neiman, leaving Neiman out-of-pocket only for brokerage fees to Wolff. These fees were to be computed as a stated percentage of the difference in price between the spot purchase and the forward sale. (First Amended Complaint, pp. 3-4; App. 3-4).

In theory, these cash and carry transactions could have different results depending upon changes in the silver market. (a) If the transactions were consummated at maturity, Neiman's purchase and sale of the silver would result in an income tax deduction for interest paid, and an offsetting capital gain. Thus, Neiman's risk in the transaction was limited. (b) If the spread between spot purchase price and the forward sale price narrowed for reasons other than the passage of time, profits would be realized as the spot price and the cost of covering the forward contract normally do not rise at the same rate. (c) If the spread between the spot purchase price widens for reasons other than the passage of time, then the contracts are allowed to run to maturity with the attendant assumed results. (*Id.*, pp. 4-5; App. 4-5).

Pursuant to his agreement with Gourlay, Neiman, from Chicago, placed orders with Wolff for seven cash and

carry silver transactions. Wolff confirmed the transactions by mail to Neiman's Chicago business address. The transactions were executed on November 29, 1974, December 2, 1974, December 3, 1974, December 4, 1974, January 29, 1975 (two transactions) and March 18, 1975. (Id., p. 5; Exhibits A, B, C, D, E and F to the First Amended Complaint; App. 9-13).

Between November of 1974 and June of 1975, Neiman, in Chicago, was in close contact with Gourlay and Wolff in London. Neiman's communications with Gourlay by mail and by Telex were all addressed to Gourlay at Wolff's London office. Gourlay communicated with Neiman on stationery bearing Wolff's letterhead. On several occasions, Neiman telephoned Gourlay at the number shown on Wolff's letterhead, and was connected with Gourlay without incident or comment. At no time did Wolff or Gourlay give Neiman any indication that Gourlay was not an officer or management official of Wolff.

In March of 1975, the spread between the spot purchase price and the forward sale price of silver narrowed. Neiman, while in London on other business, met with Gourlay on March 26, 1975. The meeting took place at Wolff's London headquarters, where Gourlay had an office. There was nothing to indicate that Gourlay's office was not part of Wolff's business, and nothing to indicate that Gourlay's office had any connection with an entity called Ingleram. At this meeting, Neiman informed Gourlay that Wolff would shortly be instructed to sell the spot silver owned by Neiman and to follow Neiman's instructions with respect to covering his forward contracts. Neiman subsequently gave these instructions to Wolff. Wolff refused to follow Neiman's instructions, and confirmed their refusal by letter on April 10, 1975. Neiman repeated his instructions on April 11, 1975, and

Wolff again refused to follow them. (Id., p. 6; App. 6). Neiman then brought this action for specific performance and damages.

SUMMARY OF THE ARGUMENT

With only a passing nod at the relevant facts, petitioner Wolff seeks to create a constitutional question where there is none. The facts demonstrate that Wolff, through its agent Gourlay, fashioned a tax shelter from cash and carry silver transactions on the London Silver Market. Gourlay journeyed to the United States to interest brokers to "hustle" (in the language of one broker) the shelter transaction among American investors. Gourlay then followed up the broker's solicitations with personal visits with the investors in the United States where the deals were closed. Hundreds of millions of dollars in transactions resulted from his activities on behalf of Wolff.

One such series of deals were with the respondent Neiman. In an extended luncheon in Chicago between Gourlay, Neiman and Casselman (the broker), virtually all of the terms of the tailor-made transaction were settled, and the transactions were later consummated in seven cash and carry transactions with Wolff which were confined by Wolff by mail delivered to respondent Neiman's Chicago business address.

There is here no dramatic new pronouncement of a constitutional extension of "due process" as that doctrine relates to personal jurisdiction over alien corporations. This is simply a garden variety direct pervasive solicitation of business by Wolff physically within the United States with United States citizens. It is ridiculous to state that Wolff did not assume it would be subject to the laws of the States of his country where the deals were made.

ARGUMENT

I.

THERE IS NO CONSTITUTIONAL QUESTION WHATEVER, LET ALONE A QUESTION OF SUBSTANCE, RAISED IN THIS PETITION.

Wolff postulates its request that this Court accept this case on the theory that the Seventh Circuit's decision was an "unprecedented commingling or amalgamation of due process concepts of 'doing business' with those arising from 'a transaction of business'." This is sheer, unadulterated nonsense.

Examination of the decision reveals that the Court considered the general background of Wolff's dealings in the United States relative to "hustling" the tax shelters in order to place in context its "hustling" of Neiman by Gourlay through the broker Casselman. To suggest that its method of operation, as evidenced by other dealings, was irrelevant in the consideration of the Neiman deal is absurd.

A word should also be said about two other contentions. First, Wolff, the alien defendant, decries the injustice of its being "hauled into an American forum" to answer for its perfidy to an American citizen. (Pet., p. 12). We would state that no one begged Wolff to hustle its tax shelter, grounded in American tax law, in the United States among American citizens. Wolff, through Gourlay actively solicited hundreds of millions of dollars in contracts, including Neiman's, within this country. To suggest that it has not "purposely (availed) itself of the privilege of concluding activities within the forum State,

thus invoking the benefits and protections of its laws," is absurd. *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958).

Secondly, Wolff has the gall to state that Neiman "duped" it into trading the silver (Pet., p. 16). This is stated in the face of the allegation of its fraud in dealing with Neiman. There is considerable doubt whether Wolff ever completed the contract. The pervasiveness of Wolff's fraudulent conduct as indicated in the depositions filed in this case, and specifically in the transactions "hustled" in Illinois alone, render absurd Wolff's claim of being duped.

II.

THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND BERSCH v. DREXEL FIRESTONE, INC., 519 F.2d 974 (2d Cir. 1975).

Petitioner suggests that the Seventh Circuit failed to credit properly the "cautious analysis" given by the Second Circuit to an alien's jurisdictional base, particularly in *Bersch* v. *Drexel Furniture, Inc.,* 519 F.2d 974 (2d Cir. 1975). Justice Tone, however, carefully distinguished *Bersch* in his opinion. (Pet. App. A12). As stated by the Court, "the purposeful objective of both Gourlay's earlier visit to Casselman and his luncheon meeting with Neiman" differentiate the instant facts from those in *Bersch.*

Careful deference was given *Bersch* and its progeny in the Court's refusal to accept respondent's contention that Wolff's pervasive business transactions, amounting to hundreds of millions in silver contracts, were insufficient to provide a separate jurisdictional basis in Wolff's "doing business" in Illinois.

III.

THE SEVENTH CIRCUIT EXPRESSLY CONSIDERED THE FACTOR OF "DISTANT OR INCONVENIENT FORUM".

Petitioner finally complains that the Seventh Circuit failed properly to consider the "burdens" of this sophisticated English trading company in defending this claim "in a distant or inconvenient forum." The simple answer to this contention is that the Seventh Circuit considered the factor of a convenient forum and concluded that "it would also be inconvenient for plaintiff to sue overseas. Given defendants' purposeful acts in Illinois, we do not find any inconvenience to amount to a denial of due process." (Pet., App. A 11, n. 8).

These is no indication that the Court failed to evaluate the various component considerations in the factor of convenience as alleged by petitioner. The unquestioned standing and prominence of the Opinion's author, Philip Tone, forecloses any suggestion that such factors were not considered. In fact, elsewhere in the Opinion he expressly commented on choice of law, the nature of the commercial transactions, the place of contemplated performance, and a disbelief that Wolff would not reasonably have expected that it would be required to defend itself in an American courtroom. The residence of witnesses and the location of relevant documents are not exclusively in England.

There is no merit whatever to petitioner's inconvenient forum contention.

CONCLUSION

There is no substantial reason, in fact no reason at all, for this Court to grant the writ of certiorari in this case. The Seventh Circuit was correct in determining that "this case does not appear to us to be worthy of further review by certiorari," in refusing a stay of the mandate.

Respectfully submitted,

WILLIAM J. HARTE
111 West Washington Street
Chicago, IL 60602
Tel. No. (312) 726-5015

JAMES P. CHAPMAN
33 North Dearborn Street
Chicago, IL 60602
Tel. No. (312) 263-0789

Of Counsel:
EDWARD T. JOYCE

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 2, 1980

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge.*
Hon. .....
Hon. .....

Nos. 79-1622 & 79-1802

DAVID NEIMAN, d/b/a London Group (1974),
Plaintiff-Appellant,

vs.

RUDOLF WOLFF AND CO. LTD., INGLERAN INVESTMENTS, LTD., an English corporation, and JAMES GOURLAY,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-C-2531

Judge THOMAS R. MCMILLEN

This matter comes before the court for its consideration on the "MOTION" requesting this court to stay its mandate pending application for a writ of certiorari filed herein on May 29, 1980 by counsel for the defendant-appellee, Rudolph Wolff & Co. Ltd. On consideration thereof,

IT IS ORDERED that said motion is hereby DENIED. This court has already denied a petition for rehearing en banc. Judge Tone's April 23, 1980 order was correctly reasoned, and this case does not appear to us to be worthy of further review by certiorari.